Supreme Court, U.S.
FILED

No. 98 - 584

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, *et al.*, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is section 306 of the Railroad Revitalization and Regulatory Reform Act (the "4-R Act"), 49 U.S.C. § 11501, legislation to enforce the Equal Protection Clause of the Fourteenth Amendment so as to abrogate the States' Eleventh Amendment immunity from suit in federal court?

LIST OF PARTIES

Petitioner is the State Board of Equalization of the State of California. Respondents are: 1) the Southern Pacific Transportation Company, a Delaware corporation with its principal place of business in Omaha, Nebraska; 2) the Union Pacific Railroad Company, a Utah corporation with its principal place of business in Omaha, Nebraska; 3) the Napa Valley Wine Train, Inc., a California corporation with its principal place of business in Napa, California; 4) the Stockton Terminal & Eastern Railway Company, a California corporation with its principal place of business in Stockton, California; and 5) the Santa Maria Valley Railroad Company, a California corporation with its principal place of business in Santa Maria, California.

The following California Counties were defendants in the actions below: Alameda, Butte, Calaveras, Colusa, Contra Costa, El Dorado, Fresno, Glenn, Imperial, Inyo, Kern, Kings, Lassen, Los Angeles, Marin, Mendocino, Merced, Modoc, Monterey, Napa, Riverside, Sacramento, San Bernadino, San Francisco, San Joaquin, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, Shasta, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Tulare, Yolo, and Yuba

Title 28 U.S.C. § 2403(a) may apply and this petition shall therefore be served on the Solicitor General of the United States.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998
No. 98 -

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, *et al.*, *Respondents*.

OPINION OR JUDGMENT BELOW

The order of the United States Court of Appeals for the Ninth Circuit, filed July 6, 1998, is not reported and is reprinted in Appendix A. The order and judgments of the United States District Court for the Northern District of California are not reported and are reprinted in Appendix B. The decision of the Court of Appeals for the Ninth Circuit in *Oregon Short Line Railroad Company v. Department of Revenue, Oregon* is reported at 139 F.3d 1259 (9th Cir. 1998), and is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its order vacating and remanding the decision of the United States District Court for the Northern District of California that defendant State Board of Equalization was immune from suit in federal court pursuant to the Eleventh Amendment. The appellate

court remanded "for proceedings consistent with *Oregon Short Line R.R. Co. v. Department of Revenue, Oregon*, 139 F.3d 1259 (9th Cir. 1998)." This Court has jurisdiction to review pursuant to 28 U.S.C. § 1254(1). A decision denying Eleventh Amendment immunity is final for purposes of appeal. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

CONSTITUTIONS, STATUTES OR REGULATIONS

The Eleventh Amendment to the U.S. Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall a State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 11501 of Title 49 of the U.S. Code provides in relevant part:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority for a State or subdivision of a State may not do any of them:
>
> (1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.
>
> (3) Levy or collect an ad valorem tax on rail transportation at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.
>
> (c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true

assessed value and true market value is governed by State law. ...

Section 1341 of Title 28, United States Code provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Pertinent portions of the following sections of the California Constitution and the California Revenue and Taxation Code are reprinted in Appendix D:

Cal. Const., art. XIII, § 19;
Cal. Rev. & Tax. Code §§ 721, 722, 731, 732, 733, 741, 742, 743, 744, 755, 756, 2601, 2602, 2603, 5148, and 5170

STATEMENT OF THE CASE

Section 306 of the Railroad Revitalization and Regulatory Reform Act (the "4-R Act", 49 U.S.C. § 11501) prohibits States and their subdivisions from applying tax schemes that unreasonably burden and discriminate against interstate commerce. Since its enactment, railroads have routinely filed suits in federal courts throughout the country to challenge State tax assessments as violative of the 4-R Act. However, this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), called into question whether the 4-R Act's stated abrogation of the States' Eleventh Amendment immunity was constitutional. The Court of Appeals for the Ninth Circuit resolved the question in this case by granting the appellant railroads' motion for summary disposition. The Ninth Circuit based its ruling on its recent decision in *Oregon Short Line, supra,* which held that Congress enacted the 4-R Act pursuant to the enforcement provisions of the Fourteenth Amendment. The

Ninth Circuit therefore vacated the district court's judgment in this case dismissing the plaintiffs' suits for lack of subject matter jurisdiction.

The Ninth Circuit's ruling is inconsistent with this Court's precedent controlling the determination whether Congress passed an enactment to enforce the Equal Protection Clause of the Fourteenth Amendment. The California State Board of Equalization (the "Board") seeks this Court's review because of the importance of this issue to States' sovereignty, and because of the frequency with which 4-R Act cases are filed in federal court.

A. State-Assessed Property.

The Board is responsible for the annual valuation and assessment of the property of railroads and public utilities. Cal. Const., art. XIII, § 19; Cal. Revenue & Taxation Code §§ 721, 722, 731, and 732. Pursuant to California Revenue and Taxation Code section 732, the Board is required to mail notice to the railroads of the assessed value of their nonunitary property and advise them of the date by which a declaration of their intent to file a petition for reassessment can be filed. If a declaration of intent or a petition for reassessment is not timely filed, then the Board's assessment becomes final at the expiration of the period specified in the Board's notice. Rev. & Tax. Code § 733. If a petition for reassessment is filed, the Board's assessment becomes final on the earlier of its decision upon the petition or December 31 of the assessment year at issue. Rev. & Tax. Code §§ 741-744.

The Counties are responsible for the collection of state-assessed property taxes. On or before July 15 of any assessment year, the Board must transmit to each County auditor an estimate of the total value of state-assessed property. Rev. & Tax. Code § 755. By July 31, the Board must transmit the assessment roll to County auditors. Rev. & Tax. Code § 756. The County auditors prepare tax calculations and transmit the rolls to the County tax collectors and the County tax collectors collect the taxes.

Rev. & Tax. Code §§ 2601, 2602 and 2603.

Railroads have a State Court remedy for the refund of property taxes. Rev. & Tax. Code § 5148. Judicial review in these suits for refund is *de novo*. Rev. & Tax. Code § 5170.

B. **Proceedings Below.**

The Southern Pacific Transportation Company ("Southern Pacific"), its successor, the Union Pacific Railroad Company, and other railroads are the plaintiffs in 4-R Act cases that have been consolidated under one master case number in the U.S. District Court for the Northern District of California since 1981. The Napa Valley Wine Train, Inc., the Stockton Terminal & Eastern Railroad Company, and the Santa Maria Valley Railroad Company (the "Wine Train plaintiffs") are plaintiffs in another 4-R Act case that the district court designated as related to the master consolidated case. Plaintiffs in all these cases assert that the Board's classification, valuation, and assessment of certain railroad property violated the federal 4-R Act.

Following this Court's decision in *Seminole Tribe*, the Board filed a motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss all of the remaining cases in the master consolidated case as well as the Wine Train plaintiffs' related case. Southern Pacific and another plaintiff filed motions for summary judgment and to amend their complaints to include a separate cause of action against the defendant Counties, to add the individual Board Members as defendants pursuant to the doctrine of *Ex Parte Young*, and to allege that the 4-R Act was enacted pursuant to the Fourteenth Amendment as well as the Interstate Commerce Clause.

On October 28, 1997, the district court issued an order regarding all the parties' motions. With regard to the Board's motion to dismiss, the court ruled that, in enacting the 4-R Act, Congress expressly intended to abrogate the states' Eleventh Amendment immunity, but its use of the Interstate Commerce Clause to abrogate that immunity was

not a valid exercise of Congressional power. The Court therefore granted the Board's motion and denied the railroads' motions. Judgments were entered on February 3, 1998, and Southern Pacific and the Wine Train plaintiffs filed notices of appeal.

On March 23, 1998, the Ninth Circuit issued its opinion in *Oregon Short Line*, holding that the 4-R Act was appropriate legislation to enforce the Equal Protection Clause. Southern Pacific thereafter filed a motion for summary disposition pursuant to Ninth Circuit Rule 3-6. The Ninth Circuit granted the motion on July 6, 1998, vacating the district court's judgment and remanding for further proceedings consistent with the *Oregon Short Line* case. The district court entered judgment pursuant to the Ninth Circuit's mandate on September 16, 1998.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S RULING IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND THREATENS LIMITLESS CONGRESSIONAL ABROGATION OF ELEVENTH AMENDMENT IMMUNITY.

Relying on its recent ruling in *Oregon Short Line,* the Ninth Circuit vacated and remanded a district court judgment dismissing the 4-R Act cases for lack of subject matter jurisdiction on the basis of the Board's assertion of Eleventh Amendment immunity. In *Oregon Short Line*, and impliedly in this case, the Ninth Circuit has ruled that Congress properly abrogated the States' Eleventh Amendment immunity in the 4-R Act, because the Act is appropriate legislation to enforce the Equal Protection Clause of the Fourteenth Amendment. The Ninth Circuit's decision is inconsistent with this Court's precedent prescribing the test for congressional abrogation of Eleventh Amendment immunity under the Fourteenth Amendment. It expands Congress' ability to abrogate the States' immunity to statutes not based on a valid exercise of power.

As this Court ruled in *Seminole Tribe*, an attempted congressional abrogation of States' Eleventh Amendment immunity cannot be upheld under the Commerce Clause. 517 U.S. at 71-74. However, the Fourteenth Amendment can support a federal statutory abrogation of immunity, provided that Congress acts "pursuant to a valid exercise of power". 517 U.S. at 55. The 4-R Act was not enacted pursuant to a valid exercise of power under the Fourteenth Amendment.

The 4-R Act explicitly prohibits conduct by State and local authorities which "unreasonably burden[s] and discriminate[s] against interstate commerce...." 49 U.S.C. § 11501. As this Court and the Ninth Circuit, itself, have observed, the purpose of the 4-R Act was to "provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987); see *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860, 865 (9th Cir. 1983). The policy supporting the 4-R Act, memorialized at 49 U.S.C. § 10101, describes the commercial and economic objectives aimed at unburdening interstate commerce by strengthening the rail transport infrastructure of this country through competition and the free market. The only mention made of prohibiting discrimination is with respect to these economic goals, and with a specific reference to "interstate commerce".

In light of the prior holdings of this Court, the Board submits that Congress cannot validly invoke its enforcement powers under section five of the Fourteenth Amendment merely because the word "discrimination" appears within the statutory text. This Court has held that the enforcement power under section five is not unlimited. See *City of Boerne v. Flores*, 521 U.S. ----, ----, 117 S.Ct. 2157, 2163, 138 L.Ed.2d 624 (1997). Statutes enacted pursuant to Congress' section five enforcement power must be remedial in nature and designed to prevent a constitutional infraction. *Id.*

Before the 4-R Act was enacted, this Court held that conventional discrimination between railroads and other classifications of property were not violations of the railroads' right to equal protection. See, e.g., *Nashville Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362,

367-371 (1940).[1] Without evidence that Congress, in enacting the 4-R Act, was acting properly to remedy Fourteenth Amendment violations, the 4-R Act cannot constitute proper action under that amendment. *City of Boerne*, 521 U.S. at ---, 117 S.Ct. at 2168-2169.

The 4-R Act does not contain a congressional expression that the Act was passed "to secure the rights under the Fourteenth Amendment." Cf. *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966). Prior to the passage of the 4-R Act, disparate classifications concerning railroads for taxation purposes did not violate the Equal Protection Clause. See *Browning*, 310 U.S. at 369 ("so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another ...").

Nevertheless, the Ninth Circuit characterizes such classifications as unconstitutional and sufficient to warrant congressional enactment of the 4-R Act under the Fourteenth Amendment Equal Protection Clause. *Oregon Short Line*, 139 F.3d at 1267. However, as this Court stated in the *City of Boerne* case, "Congress does not enforce a constitutional right by changing what the right is." 521 U.S. at ---, 117 S.Ct. at 2164. Congress cannot make constitutional classifications unconstitutional, even if it can make such classifications unlawful. The 4-R Act prohibited long-standing, constitutionally permissible discriminatory taxation practices. While it has such powers under the Commerce Clause, it could not make such discrimination unconstitutional under the Equal

---

1. "That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate--these are among the commonplaces of taxation and of constitutional law." *Browning*, 310 U.S. at 368.

Protection Clause. Moreover, it should not be inferred, solely for the purpose of circumventing the States' Eleventh Amendment immunity, that the Act is legislation to enforce the Equal Protection Clause. See *Quern v. Jordan*, 440 U.S. 332, 342-345 (1979). This Court has noted that, when Congress has not expressly articulated its intent to legislate pursuant to the Fourteenth Amendment, this Court will not "quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Pennhurst State School v. Halderman*, 451 U.S. 1, 15-16 (1981).

The Ninth Circuit's permissive test for implicit abrogation of Eleventh Amendment immunity creates a grave danger of limitless congressional and judicial overrides of the States' immunity from suit in federal court. Under the Ninth Circuit's reasoning, *Oregon Short Line*, 139 F.3d at 1266, a federal court is free to find that Congress abrogated Eleventh Amendment immunity under the Fourteenth Amendment by a statute that prohibits conduct which is not itself unconstitutional, so long as the court determines that the effect of the statute can be expected, under at least some circumstances, to result in enforcement of a Fourteenth Amendment guarantee. Significantly, the Ninth Circuit found it unnecessary in *Oregon Short Line* to determine whether the railroad had been deprived of any Fourteenth Amendment guarantees.

Without a constitutional infraction of the Fourteenth Amendment, there is no issue to address concerning whether the section five enforcement power can be employed to abrogate the States' Eleventh Amendment immunity. Thus, in the 4-R Act, Congress could not have been acting to redress a Fourteenth Amendment injury, for no Fourteenth Amendment injury existed. "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at —, 117 S.Ct. at 2164. Accordingly, after the *Seminole*

Tribe decision, and in the absence of any other legitimate constitutional grant of power, the congressional intent to abrogate the States' immunity under the 4-R Act cannot be upheld as enacted pursuant to a valid exercise of Fourteenth Amendment power. The Ninth Circuit's test for validity under section five of the Fourteenth Amendment is so permissive, "it is difficult to conceive of a principle that would limit congressional power." *City of Boerne*, 521 U.S. at —, 117 S.Ct. at 2168. This Court should grant the petition to curtail the Ninth Circuit's permissive test for congressional abrogation under the Fourteenth Amendment.

CONCLUSION

In *Seminole Tribe* this Court ruled that the Fourteenth Amendment is the sole source of Congressional power to abrogate unilaterally the States' immunity from suit in federal courts. *Seminole Tribe* teaches that the Commerce Clause does not grant Congress the power to abrogate Eleventh Amendment immunity, and makes clear that Congress' power to abrogate is limited.

However, the Ninth Circuit's decision radically expands congressional abrogation authority. Under the Ninth Circuit's reasoning, a federal statute, such as the 4-R Act, intended to ameliorate Commerce Clause concerns, can be linked to the Fourteenth Amendment simply by a congressional reference to the word "discrimination", even if the discrimination does not violate Equal Protection guarantees. The Ninth Circuit's reasoning emasculates the essential teaching of *Seminole Tribe*. The petition should be granted to ensure the vitality of that important decision and to curtail further encroachment into States' Eleventh Amendment immunity.

Dated: October 5, 1998.

Respectfully submitted,

DANIEL E. LUNGREN
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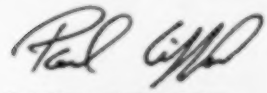

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, et al., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX C

APPENDIX D

Dated: October 5, 1998.

Respectfully submitted,

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APPENDIX A

APPENDIX A

JUDGMENT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-17240
CT/AG#: CV-94-01199

NAPA VALLEY WINE TRAIN, INC, a California corporation; STOCKTON TERMINAL & EASTERN R.R. CO., a California corporation; SANTA MARIA VALLEY RAILROAD COMPANY, a California corporation

Plaintiffs - Appellants

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; COUNTY OF NAPA; COUNTY OF SAN JOAQUIN; COUNTY OF SANTA BARBARA

Defendants - Appellees

NO. 98-15320
CT/AG#: CV-89-03603-DLJ

NORTHWESTERN PACIFIC RAILROAD COMPANY; VISALIA ELECTRIC RAILROAD COMPANY

Plaintiffs

and

SOUTHERN PACIFIC TRANSPORTATION COMPANY

Plaintiff - Appellant

v.

BUTTE COUNTY; CALIFORNIA STATE BOARD OF EQUALIZATION; CALAVASAS COUNTY; EL DORADO COUNTY; COLUSA COUNTY; FRESNO COUNTY; GLENN COUNTY;

CONTRA COSTA COUNTY; INYO COUNTY; AMADOR COUNTY; IMPERIAL COUNTY; LASSEN COUNTY; LOS ANGELES COUNTY; MADERA COUNTY; MARIN COUNTY; MENDOCINO COUNTY; MERCED COUNTY; MODOC COUNTY; KERN COUNTY; NAPA COUNTY; NEVADA COUNTY; KINGS COUNTY; ORANGE COUNTY; MONTEREY COUNTY; RIVERSIDE COUNTY; SACRAMENTO COUNTY; SAN BENITO COUNTY; SAN BERNARDINO COUNTY; SAN FRANCISCO CITY AND COUNTY; SAN JOAQUIN COUNTY; SAN LUIS OBISPO COUNTY; SAN MATEO COUNTY; SANTA BARBARA COUNTY; SANTA CLARA COUNTY; SANTA CRUZ COUNTY; SHASTA COUNTY, SIERRA COUNTY; SISKIYOU COUNTY; SOLANO COUNTY; SONOMA COUNTY; ALAMEDA COUNTY; STANISLAUS COUNTY; SUTTER COUNTY; TEHAMA COUNTY; TULARE COUNTY; VENTURA COUNTY; PLACER COUNTY; YOLO COUNTY; YUBA COUNTY

Defendants - Appellees

APPEAL FROM the United States District Court for the Northern Division of California (Oakland).

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the appeal from D.C. in this cause be, and hereby is VACATED AND REMANDED.

Filed and entered July 6, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAPA VALLEY WINE TRAIN, INC., a California corporation, et al., Plaintiffs-Appellants, v. BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, Defendants-Appellees.	No. 97-17240 DC# CV 94-1199-DLJ Northern California (Oakland)
NORTHWESTERN PACIFIC RAILROAD COMPANY; et al., Plaintiffs, v. SOUTHERN PACIFIC TRANSPORTATION COMPANY, Plaintiff-Appellant, v. BUTTE COUNTY; et al., Defendants-Appellees.	No. 98-15320 DC# CV 89-3603-DLJ Northern California (San Francisco) ORDER

Before: REINHARDT, THOMPSON and LEAVY, Circuit Judges

Appellants' motion for summary disposition of these appeals is granted. See 9th Cir. Rule 3-6(a). The district

court decision is vacated and these cases are remanded to the district court for proceedings consistent with Oregon Short Line R.R. Co. v. Department of Revenue Oregon, 139 F.3d 1259 (9th Cir. 1998).

All other pending motions are denied as moot.

VACATED and REMANDED.

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APPENDIX B

APPENDIX B

SOUTHERN PACIFIC TRANSPORTATION CO., Plaintiffs, v. STATE BOARD OF EQUALIZATION, et al., Defendants.	No. C-89-3603 DLJ
THE ATCHISON TOPEKA & SANTA FE RAILWAY CO., Plaintiff, v. STATE BOARD OF EQUALIZATION, et al., Defendants.	Nos. C-89-4030 DLJ C-95-3532 DLJ
	No. C-94-1199 DLJ
NAPA VALLEY WINE TRAIN, INC., and STOCKTON TERMINAL & EASTERN R.R. CO., Plaintiffs, v. STATE BOARD OF EQUALIZATION, et al., Defendants.	Master Consolidated No. C-81-4365 DLJ ORDER

On July 18, 1997, the court heard argument on the following motions: (1) the State Board of Equalization's motion to dismiss; (2) Southern Pacific's motion for summary judgment; (3) Santa Fe's motion for summary judgment regarding its 1991 escape assessment (4) Santa Fe's motion for summary judgment regarding its 1993 NURPEFAR assessment; (5) the Wine Train plaintiffs' motion for summary judgment; (6) Southern Pacific's motion for leave to amend; and (7) Santa Fe's motion for leave to amend.

Paul J. Mooney appeared on behalf of Southern Pacific and Santa Fe; Terrence J. Benshoof appeared for the Wine Train plaintiffs' Marguerite c. Stricklin appeared for the State Board of Equalization; and Kevin L. Norris appeared on behalf of the County defendants.

Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby rules as follows:

I. BACKGROUND

These consolidated cases all arise out of complaints alleging that defendants State Board of Equalization ("the Board") and various California counties ("the Counties") violated § 306(1)(d) of the federal Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act") (codified in part at 49 U.S.C. U 11503).[1/] Plaintiffs are the following railroads: The Atchison, Topeka & Santa Fe Ry. Co. ("Santa Fe") (Case Nos. C-89-4030 DLJ and C-95-3532 DLJ); Southern Pacific Transportation Co. ("Southern Pacific") (Case No. C-89-3603 DLJ); Napa Valley Wine Train, Inc., Stockton Terminal & Eastern R.R. Co., and Santa Maria Valley Railroad Co. (collectively "the Wine Train plaintiffs:) (Case No. C-94-1199 DLJ). In each case, plaintiffs challenge the Board's assessment of a tax on property classified by the Board as "non-unitary railroad property eligible for 4-R Act relief" ("NURPEFAR").[2/]

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1. In the latest recodification of the 4-R Act, effective January 1, 1996, 49 U.S.C. § 11503 was renumbered § 11501.

2. The two different categories of NURPEFAR at

Section 306 of the 4-R Act prohibits states and their subdivisions from enacting certain taxation schemes that discriminate against railroads. See *Department of Revenue of Oregon* v. *ACF Industries, Inc.*, 114 S.Ct. 843, 846 (1994). Specifically, § 306(1) provides, in relevant part:

> [A]ny action described in this subsection is . . . unreasonable and unjust discrimination against and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described) for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

> (b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).
>
> (c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

4-R Act § 306(1).

A. <u>The Santa Fe Cases</u>

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issue here have previously been labelled "restructuring plan property" and "commuter property."

In 1993, the Court held a trial in Case No. C-89-4030 DLJ. Following the trial, the Court found that the board had engaged in discriminatory classification and taxation of Santa Fe's NURPEFAR in violation of § 306(1)(d). An Order to this effect was filed on June 7, 1994, followed by Findings of Fact and Conclusions of Law filed on September 7, 1994. On September 12, 1994, the Court entered the Partial Judgment submitted by Santa Fe, pursuant to which defendants were"permanently enjoined form collecting or seeking to collect any taxes on the Subject [NURPEFAR] Property as defined in the court's Findings of Fact and Conclusions of Law for tax years 1989 through 1992." A Modified Partial Judgment was filed on April 24, 1995 in order to correct an incorrect amount set forth in the original judgment.

The Board filed a notice of appeal in this case on May 23, 1995. On June 29, 1995, the Board sent Santa Fe a notice of a non-unitary escape assessment for Santa Fe's commuter property for 1991, stating that the Counties would not attempt to collect any taxes based on this escape assessment pending the outcome of the Board's appeal to the Ninth Circuit in Case No. C-89-4030 DLJ. Nonetheless, on October 4, 1995, Santa Fe filed a new case, C-95-3532 DLJ, alleging that the escape assessment for 1991 constituted a discriminatory tax in violation of § 306. At the time it filed the new case, Santa Fe also filed a motion for order directing the Board to show cause why it should not be held in contempt for issuing the escape assessment. In its motion, Santa Fe alleged that the 1991 escape assessment violated the injunction embodied in the Partial Judgment and Modified Partial Judgment in Case No. C-89-4030 DLJ. On February 26, 1996, the Court denied Santa Fe's contempt motion. Finally, on January 6, 1997, the Ninth Circuit dismissed the board's appeal in Case No. C-89-4030 DLJ as untimely.

B. The Southern Pacific Case

A trial was scheduled for December 1994 with respect to Southern Pacific's allegations that defendants violated § 306(d)(1) in assessing Southern Pacific's NURPEFAR. However, counsel for Southern Pacific, who is also counsel for Santa Fe, notified the Court on November 16, 1994 that a trial was not necessary because the parties had come to an

agreement. First, the parties agreed to enter a stipulated permanent injunction that would apply for the 1993 and 1994 tax years to the restructuring plan NURPEFAR. Second, they agreed to a stipulated preliminary injunction as to the "line sale" NURPEFAR which would also apply for the 1993 and 1994 tax years. Further preliminary injunctions were later entered with respect to Southern Pacific's NURPEFAR for the tax years 1995 and 1996. These stipulated injunctions effectively precluded any assessment for Southern Pacific's NURPEFAR pending the resolution on appeal of the related issues in the preceding Santa Fe case.

C. The Wine Train Case

In April 1994, the Napa Valley Wine Train, Inc. and the Stockton Terminal & Eastern Railroad Company filed an action, C-94-1199 DLJ, seeking relief for the 1993 tax year and years thereafter. In 1995, the Court granted in part a motion to amend the complaint to add the Santa Maria Valley Railroad Company as a plaintiff, and Santa Barbara County as a defendant. However, because Santa Maria had already paid its 1993 taxes, it was granted leave only to seek relief for the 1994 tax year.

On June 20, 1995, following negotiations to which the Wine Train plaintiffs were not a party, the Court entered a Stipulated Order and Permanent injunction in Master Consolidated Case No. C-81-4365 DLJ, setting forth the formula for calculating the equalization ration for each tax year beginning with 1994. The Board also used this formula to determine ratios for years prior to 1994. The plaintiffs in the Wine Train case were not among the designated parties to which the Stipulated Order and Permanent Injunction would apply. Nevertheless, the Wine Train plaintiffs now request that the Court enjoin the Counties from collecting taxes based on the 1990 through 9194 assessments of their property to the extent that those assessments are in excess of the stipulated ratios. Plaintiffs also seek a refund of previously overpaid taxes from the Counties.

D. The Present Motions

In 1996, the United States Supreme Court decided the case of *Seminole Tribe of Florida* v. *Florida*, 116 S.Ct. 1114 (1996). The Court's opinion in that case severely limited Congress' ability to authorize suits against a state in federal

court without the consent of the state. Based on this decision, the Board now moves, pursuant to Fed. R. Civ. P. 12(b)(1), to dismiss all of the remaining cases in this consolidated action for lack of subject matter jurisdiction. Concurrently, plaintiffs Santa Fe and Southern Pacific move to amend their complaints to name the individual Board members as defendants and to state separate claims against the counties. Finally, plaintiffs in all of the present cases move for summary judgment on the ground that this Court has already found the Board's NURPEFAR assessments to be unlawful.

On July 18, 1997, the court held a hearing on all of the pending motions. On July 28, 1997, the Court requested supplemental briefing regarding certain issues that arose at the hearing. Having reviewed the supplemental briefs filed by the parties, the Court now rules as follows.

II. DISCUSSION

The Board argues that this case must be dismissed for lack of subject mater jurisdiction, as the Eleventh Amendment to the United States Constitution provides the Board, as an arm of the state, with immunity from suit in federal court. Plaintiffs respond that § 306 of the 4-R Act was a valid exercise of Congress' power to abrogate the state's Eleventh Amendment sovereign immunity with respect to challenges to discriminatory taxation of railroads.[3/] Alternatively, plaintiffs contend that if the Board is immune from suit, the individual Board members still may be sued under the doctrine of *Ex Parte Young*. Finally, plaintiffs argue that even if the Court dismisses the Board and its members from this suit, the suit may be maintained against the remaining County defendants.

A. Eleventh Amendment Immunity

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3. Plaintiff Napa Valley Wine Train also argues that the Board is not actually an arm of the state, and therefore is not entitled to sovereign immunity. This argument fails because the Ninth Circuit has explicitly recognized that the California State Board of Equalization is a state agency, entitled to Eleventh Amendment immunity. See *V.O. Motors* v. *State Board of Equalization*, 691 F.2d 871, 872-73 (9th Cir. 1982).

The Eleventh Amendment to the U.S. Constitution bars from the federal courts suits against a state by private citizens. *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 241 (1985); *Hans* v. *Louisiana*, 134 U.S. 1, 15 (1890). Unless a state has waived its Eleventh Amendment immunity or Congress has validly abrogated it, a state cannot be sued regardless of the relief sought. See *Atascadero*, 473 U.S. at 238; see also *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

The Board claims that it is entitled to Eleventh Amendment immunity in this case pursuant to the Supreme Court's decision in *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114 (1996). Prior to *Seminole*, it was well settled that a federal district court had jurisdiction over state defendants alleged to have violated the 4-R Act by discriminatory taxation of railroads. However, *Seminole* reexamined Congress' authority to grant federal courts jurisdiction over nonconsenting state defendants. Specifically, in *Seminole* the Supreme Court held that the Indian Commerce Clause did not authorize congress to enact legislation granting federal courts jurisdiction over a nonconsenting State. *Seminole*, 116 S.Ct. at 1119. The Court held that Congress only has the power to abrogate states' Eleventh Amendment immunity pursuant to the enforcement provisions of § 5 of the Fourteenth Amendment. *Id.* at 1125. In the case at hand, the Board argues that because the 4-R Act was not enacted pursuant to the Fourteenth Amendment, *Seminole* compels the conclusion that the Eleventh Amendment protects the Board from suit in federal court.

As a preliminary matter, plaintiffs argue that the issue of sovereign immunity must be raised as an affirmative defense. Because the Board has failed to do so, plaintiffs contend that the Board's present motion to dismiss for lack of subject matter jurisdiction is premature.

The exact nature of the Eleventh Amendment jurisdictional bar has never been precisely defined. See *Union Pacific R.R. Co.* v. *Burton*, 949 F.Supp. 1547, 1551 (D. Wyo. 1996) (citing Wright, Miller, and Cooper, *Federal Practice and Procedure*, § 3524 (2d ed. 1984)). While the Ninth Circuit has indicated that Eleventh Amendment immunity should be treated as an affirmative defense which

can be waived, *Itsi TV Productions* v. *Agricultural Associations*, 3 F.3d 1289, 1291-92 (9th Cir. 1993), the *Seminole* decision requires, where a state is entitled to Eleventh Amendment immunity, that the case be dismissed for lack of jurisdiction. *Seminole*, 116 S. Ct. at 1132 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). Thus, the Court finds, in light of the *Seminole* decision, that the question of the Board's Eleventh Amendment immunity implicates jurisdictional concerns which are ripe for consideration at this stage.

Accordingly, the Court now turns to the question of whether Congress, by enacting the 4-R Act, has abrogated the Board's state sovereign immunity in the present case.

1. Abrogation for Eleventh Amendment Immunity

Congress may abrogate the states' Eleventh Amendment sovereign immunity if it has (1) unequivocally expressed its intent to abrogate the immunity and (2) acted pursuant to a valid exercise of power. *Seminole*, 116 S. Ct. at 1123; see also Green, 474 U.S. at 68. Here, there is no dispute that Congress, in drafting the 4-R Act, expressly intended to abrogate the states' sovereign immunity with respect to discriminatory tax rates and assessments applied to rail transportation property. See 49 U.S. § 11501(c); see also *ACF Industries, Inc.*, 114 S. Ct. at 850-51; *Trailer Train Co.* v. *State Board of Equalization*, 697 F. 2d 860, 865-66 (9th Cir. 1983). Thus, the issue left to be decided by this Court is whether Congress passed the 4-R Act pursuant to a valid exercise of power.

Whether a congressional exercise of power was valid turns upon whether the statute in question was passed pursuant to a constitutional provision granting Congress the power to abrogate. *Seminole*, 116 S. Ct. at 1125. In *Seminole*, the court held that Congress only has the power to abrogate states' Eleventh Amendment immunity pursuant to the enforcement provisions of § 5 of the Fourteenth Amendment. *Id.* at 1125 (citing *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976)). In so ruling, the Court overturned *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), which held that the Interstate Commerce Clause, Art. I, § 8, cl. 3,

granted Congress the power to abrogate state sovereign immunity. *Seminole*, 116 S. ct. at 1125, 1128. Consequently, in the present case, unless the Court finds that § 306 of the 4-R Act was passed pursuant to Congress' Fourteenth Amendment enforcement power, the court must hold that Congress' attempt to abrogate state sovereign immunity under the 4-R Act was invalid.

a. The 4-R Act was an Exercise of Congress' Commerce Power

As a starting point, it is undisputed that Congress was in fact acting pursuant to its power under the Commerce Clause in enacting the 4-R Act. The Supreme Court has recognized that the 4-R Act's purpose, as stated in the Congressional declaration of policy, is "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." *Burlington Northern R. Co.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). As just one of the means to achieve its goal of furthering railroad financial stability, Congress enacted § 306, prohibiting discriminatory State and local taxation of common and contract carrier transportation property." See *Trailer Train Co.*, 697 F.2d at 865 (quoting S. Rep. No. 630, 91st Cong., 1st Sess. (1969)).[4/]

Despite the fact that the 4-R Act is obviously grounded in Congress' commerce power, plaintiffs urge the Court to find that the Act can also be viewed as a valid exercise of Congress' Fourteenth Amendment enforcement power. Plaintiffs are correct that the lack of an explicit reference by Congress to the Fourteenth Amendment in passing the statute is not dispositive. "The question of the constitutionality of action taken by taken by Congress does not depend upon recitals of the power which it undertakes to exercise." See

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4. Before passing § 306 as part of the comprehensive 4-R Act, Congress had given consideration to numerous bills containing language virtually identical to that of § 306. The Ninth Circuit has indicated that it is proper for courts to rely on the legislative history of these prior bills to assist in interpreting § 306. See *Trailer Train Co.*, 697 F.2d at 865 n. 6 (citation omitted).

Woods v. *Miller*, 333 U.S. 138, 144 (1948). There is in fact no requirement that congress recite the words "section 5" or "Fourteenth Amendment" or equal protection" in order to exercise its power under § 5 of the Fourteenth Amendment. *EEOC* v. *Wyoming*, 460 U.S. 226, 244 n. 18 (1983); see also *Fulligrove* v. *Klutznick*, 448 U.S. 448, 476-78 (1980). Rather, it is the Court's task to decipher whether Congress has enacted legislation pursuant to § 5. See *Ramirez* v. *Puerto Rico Fire Service*, 715 F.2d 694, 698 (1st Cir. 1983).

In order to find that Congress acted pursuant to its Fourteenth Amendment enforcement power, the Court must be able to discern some "legislative purpose or factual predicate" that supports the exercise of that power. *Id.* (citing *EEOC* v. *Wyoming*, 103 S. Ct. at n. 18). The Court's inquiry must focus on whether or not the objectives of the legislation are within the scope of Congress' power under § 5. *Ramirez*, 715 F.2d at 698 (citations omitted); see also *Elrod*, 674 F.2d at 604, 608-09 (holding that courts must determine, by looking to the history and structure of the legislation, whether the purpose of the statute was within congress' § 5 enforcement power); see also *Timmer* v. *Michigan Dept. Commerce*, 104 F.3d 833, 840 (6th Cir. 1997). But see *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 15-16 (1981) (urging courts not to "quickly attribute" to Congress an unstated intent to act pursuant to § 5).

b. Congress Did Not Enact the 4-R Act Pursuant to its Fourteenth Amendment Enforcement Power

The Court is aware of no post-*Seminole* Ninth Circuit decision to guide its inquiry into whether the 4-R Act is within Congress' Fourteenth Amendment enforcement power.[5/] Thus, the Court is left to look to the decisions of

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5. *Union Pacific R.R. Co.* v. *Burton*, 949 F.Supp. 1546 (D. Wyo. 1996) is the only published post-*Seminole* decision this Court finds that directly addresses whether the 4-R Act is within Congress' Fourteenth Amendment enforcement power. In *Union Pacific*, the court rejected the position that the 4-R Act could have been enacted to enforce the Fourteenth Amendment. *Union Pacific*, 949 F. Supp. at 1554.

courts in other circuits regarding the validity of other statutes. For instance, in *Wilson-Jones* v. *Caviness*, 99 F.3d 203, 210 (6th Cir. 1996), amended at 107 F.3d 358 (9th Cir. 1997), the Sixth Circuit was required to determine whether the Fair Labor Standards Act ("FLSA") could be regarded as an enactment to enforce the Fourteenth Amendment Equal Protection Clause.

In making its determination, the court looked to the factors set out in *Katzsenback* v. *Morgan*, 384 U.S. 641 (1966) (upholding the Voting Rights Act as appropriate to enforce the Fourteenth Amendment). Thus, the inquiry made by the Court was whether the statute

> (1) may be regarded as enactment to enforce the Equal Protection Clause, (2) whether it is 'plainly adapted to that end,' and (3) whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'

Wilson-Jones, 99 F.3d at 209 (citing *Katzenbach*, 384 U.S. at 651 (quoting *McCulloch* v. *Maryland*, 17 U.S. 316, 421 (1819)).

Focusing on the first of the *Katzenbach* factors, the court concluded that the FLSA could not be regarded as serving a Fourteenth Amendment purpose simply because it was aimed at remedying wage "discrimination" between state and private-sector employees. *Wilson-Jones*, 99 F.3d at 210. Rather, the court held that, in the absence of explicit comment by Congress, it would regard as an enactment to enforce the Equal Protection Clause, "only efforts to remedy discrimination against a class of persons that the Fourteenth Amendment jurisprudence has already identified as deserving special protection." *Id.*

Plaintiffs here read cases such as *Wilson-Jones* to require that this court inquire into whether Congress could have passed the 4-R Act pursuant to its Fourteenth Amendment enforcement power. This appears to the Court to be the method espoused by the Supreme Court, as well as other circuit court. Nonetheless, this Court questions the wisdom of an analytical approach which requires the Court to determine what Congress could have done, as opposed to what it did in fact do, or what it would do given the opportunity to reenact the statute in light of the Supreme Court's holding in *Seminole*. In any event, in the present

case, regardless of which analytical framework is employed, the Court easily finds, for the following reasons, that there is no way in which the 4-R Act can be viewed as a valid exercise of Congress' power to enforce the Fourteenth Amendment Equal Protection Clause.

First, it is clear that the purpose of the 4-R Act as a whole was to protect interstate commerce. Strong evidence of this goal is found in the statute's statement of policy, where only one of the fifteen stated policies is "to prohibit unlawful discrimination." See 49 U.S.C. § 10101(12). All of Congress' other stated objectives in regulating the railroad industry are either commercial in nature or based on public health and safety concerns. This policy statement, combined with the Supreme Court's interpretation of the 4-R Act as a commerce-related statute, see *Burlington Northern*, 481 U.S. at 457, leads the Court to find that the 4-R Act is in no way grounded in equal protection concerns. See *Union Pacific*, 949 F.2d at 1554.

The Court also finds that even if it were to follow plaintiffs' suggestion and analyze § 306 independent from the rest of the 4-R Act, the same conclusion would be reached. *Cf. Usery* v. *Charleston County Sch. Dist.*, 558 F.2d 1169 (4th Cir. 1977) (holding that the Equal Pay Act is severable from the wage and overtime provisions of the FLSA for purposes of Fourteenth Amendment analysis); *Timmer*, 104 F.3d at 842 (same); *EEOC* v. *Elrod*, 674 F.2d 601, 610 (7th Cir. 1982) (holding that the ADEA was a valid enactment under the Fourteenth Amendment enforcement power even though it was part of the FLSA).

Plaintiff's argue that § 306 is "fundamentally an anti-discrimination statue" in that it requires states to tax railroads on an equal basis with other commercial property. In making this argument, plaintiffs rely heavily upon the legislative history of § 306, which repeatedly speaks of the problem of state tax discrimination against railroads. However, plaintiffs can point to only a single reference to the Equal Protection Clause in this extensive legislative history. This reference is found in a Senate Commerce Committee report which includes testimony regarding federal district courts voiding certain discriminatory taxes on railroads as violative of the Equal Protection Clause of the

Fourteenth Amendment. See S. Rep. No. 630, 91st Cong. 1st Sess. at 7 (1969).

The Board does not dispute that § 306 was enacted in response to discriminatory state taxation of railroads. Rather, the Board questions the significance to be attached to the mere use of the word "discrimination" in the statute and in the legislative history. The Board argues, and the Court agrees, that the mere recitation of the words "unequal and discriminatory taxation, do not render the 4-R Act, or § 306 standing alone, an equal protection statute.[6/] As discussed above, the statute's purpose is clearly to protect railroads in interstate commerce. See *Union Pacific*, 949 F. Supp. at 1553-54; see also *Burlington Northern*, 481 U.S. at 457. Thus, § 306 of the 4-R Act cannot be regarded as an effort to remedy discrimination against a class of persons traditionally given protection under Fourteenth Amendment jurisprudence. *Cf. Wilson-Jones*, 99 F.3d at 210. The Court is aware of no case which would even suggest extending the reach of this traditional protectional to a group of taxpayers comprised of business entitles running railroads. If the court were to find in this case that § 306 could be regarded as an enactment to enforce the Fourteenth Amendment simply because it contained a talismanic reference to "discrimination," then Congress § 5 enforcement powers would be limitless, thereby stripping the Supreme Court's *Seminole* decision of any real meaning.

In sum, the Court finds that the purpose of the legislation at issue in this case is to strengthen the railroads' position in interstate commerce, rather than to cure invidious discrimination against a discrete group which has

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6. The Court notes that other courts have found that there is nothing in the language or the legislative history of the 4-R Act to suggest that equal protection analysis is to be applied to claims under the statute. See, e.g., *ABF Freight System, Inc.* v. *Tax Div. of Arkansas*, 787 F.2d 292 (8th Cir. 1986) (citing *Atchison, Topeka, & Santa Fe Railway* v. *Lennen*, 732 F. 2d 1495 (10th Cir. 1994)); *Arkansas-Best Freight Systems, Inc.* v. *Lynch*, 723 F.2d 365 (4th Cir. 1983); *Clinchfield Railroad* v. *Lynch*, 700 F.2d 126 (4th Cir. 1983).

traditionally been protected by the Fourteenth Amendment. *Accord Union Pacific*, 949 F.Supp. at 1553-54. Thus, the Court finds that neither the 4-R Act as a whole, nor § 306 by itself, was validly enacted pursuant to Congress' Fourteen Amendment enforcement power. Therefore, under *Seminole*, Congress' use of the commerce clause in this case overstepped its authority in expressly authorizing 4-R suits against states in federal court. As a result, this Court lacks subject matter jurisdiction over the Board in this case. Consequently, the Board's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) must be granted unless it can be established that the Board waived its sovereign immunity.

2. Waiver of Sovereign Immunity

Plaintiffs argue that even if the Board was entitled to sovereign immunity at the outset of this case, it has since waived that immunity. "The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero*, 473 U.S. at 241. A state's waiver of Eleventh Amendment immunity must generally be "unequivocally expressed." *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 99 (1984) (citation omitted). The Supreme Court has suggested, however, that Eleventh Amendment immunity may in some cases be forfeited by the state's failure to assert it. See *Blatchford* v. *Native Village of Noatak*, 111 S.Ct. 2578, 2584 n.3 (1991) see also *Itsi*, 3 F.3d at 1291.

Plaintiffs contend that the Board has waived its immunity by litigating this case for sixteen years and stipulating to the various injunctions discussed above. However, as the Board points out, it was not actually entitled to sovereign immunity until last year, when the *Seminole* was decided. In light of the fact that the Board had no challenge to this Court's jurisdiction until last year, the Court finds it difficult to see how the Board's appearance before this Court can be deemed a "voluntary" waiver of immunity.

In addition, in order for a state statute or constitutional provision to serve as a waiver of the state's Eleventh Amendment Immunity, it must specify the state's intention to subject itself to suit in federal court. *Atascadero*, 473 U.S. at 241-42 (emphasis added). Here, California Constit.

Art. XIII, § 32 provides that only the state legislature may determine how and when the state may be sued with respect to collection of taxes. Statutes passed pursuant to this section provide that the sole remedy for challenging California taxes is a suit for refund. See, e.g., Cal. Rev. & Tax. Code §§ 5140, *et seq*. Thus, California law provides no explicit waiver of sovereign immunity for suits challenging discriminatory taxes, such as the present case.

For the reasons stated above, the Court finds that the Board has not waived its sovereign immunity in this case, and must therefore be dismissed as a defendant. Having determined that the Board must be dismissed from the case, the Court must now decide whether the suit may proceed against the individual Board members or against the County defendants alone.

B. *Ex Parte Young*

Plaintiffs, citing the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), contend that they can maintain their claims against the individual members of the Board. On this basis, plaintiffs Santa Fe and Southern Pacific have moved for leave to amend their present complaints.[7/] The Wine Train plaintiffs
do not similarly seek leave to proceed against the individual Board Members.

In *Ex Parte Young*, the Supreme Court held that the Eleventh Amendment does not bar a suit in federal court against a state official acting in violation of federal law. *Ex Parte Young*, 209 U.S. at 159-60.[8/] There are, however, limits on such suits. When a plaintiff brings a suit against

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7. Santa Fe has filed a motion for leave to amend only in Case No. C-89-4030 DLJ, and not in Case No. C-95-3532 DLJ regarding the 1991 escape assessment.

8. In *Seminole*, the Court recognized the continuing viability of the *Ex Parte Young* doctrine. See *Seminole,* 116 S.Ct. at 1132-33. However, *Seminole* instructs courts to be wary of allowing a plaintiff to maintain a suit against a state official where "Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Id.* at 1132.

a state official alleging a violation of federal law, a federal court may award prospective injunctive relief governing that official's future conduct, but may not award retroactive relief that requires the payment of funds from the state treasury. See *Edelman* v. *Jordan*, 415 U.S. 651, 667-69 (1974); see also *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979); *Natural Resources Defense Council* v. *California Department of Transportation*, 96 F.3d 420, 422 (9th Cir. 1996).

1. *Coeur d'Alene*

The Supreme Court recently reexamined the scope of the *Ex Parte Young* doctrine in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 117 S.Ct. 2028 (1997). In that case, an Indian tribe and several of its members brought suit in federal court against the State of Idaho, state agencies, and state officials, alleging ownership of the banks and submerged lands of lake Coeur d'Alene. The Tribe sought a declaratory judgment, as well as an injunction prohibiting defendants from regulating the lands. The Ninth Circuit held that the State of Idaho and the state agencies were immune from suit; however, it found that the Tribe's claims could proceed against the state officials under the *Ex Parte Young* doctrine.

The Supreme Court reversed, holding the *Ex Parte Young* doctrine inapplicable. In reaching this decision, Justice Kennedy, joined by Chief Justice Rehnquist in the principal opinion, and joined in part by Justice O'Connor, Justice Scalia and Justice Thomas, concurring, stated as follows:

> To interpret *Young* to permit a federal court-action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction . . . . Application of the *Young* exception must reflect system and respect for state courts instead of a reflexive reliance on an obvious fiction. *Coeur d'Alene*, 117 S.Ct. at 2034.

These same five Justices also jointed in concluding as follows:

> It is apparent, then, that if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable. The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case. *Id.* at 2043.

In reaching this conclusion, Justice Kennedy, in parts of the principal opinion joined only by Chief Justice Rehnquist, endorsed a case-by-case balancing test for determining when the fiction of *Ex Parte Young* should apply. The factors to be considered under this balancing approach are as follows: (1) the availability of a state forum to hear the dispute; (2) the particular federal right at issue; and (3) the degree of federal intrusion upon state sovereignty if the suit is allowed to proceed. See *Coeur d'Alene*, 117 S.Ct. at 2035-38.

As stated above, Justice O'Connor, in a concurrence joined by Justice Scalia and Justice Thomas, agreed with the result reached in the principal opinion. However, the concurring Justices found that opinion to be "flawed in several respects." *Coeur d'Alene*, 117 S.Ct. at 2045 (O'Connor, J., Concurring). At its core, the concurring Justices' issue with the principal opinion is that it replaces a well-settled "straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective" with a "vague balancing test." *Id.* at 2047. Thus, Justice O'Connor concludes as follows:

> While I do not subscribe to the principal opinion's reformulation of the appropriate jurisdictional inquiry for all cases in which a plaintiff invokes the *Young* doctrine, I nevertheless agree that the Court reaches the correct conclusion here. The *Young* doctrine rests on the premise that a suit

> against a state official to enjoin an ongoing violation of federal law is not a suit against the State. Where a plaintiff seeks to divest the State of all regulatory power over submerged lands -- in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands -- it simply cannot be said that the suit is not a suit against the State. I would not narrow our *Young* doctrine, but I would not extend it to reach this case. *Id.* at 2047.

Finally, in dissent, Justice Souter, joined by Justice Stevens, Justice Ginsburg, and Justice Breyer, notes that Justice O'Connor "wisely rejects the lead opinion's call for federal jurisdiction contingent on case-=by-case balancing . . . ." *Id.* at 2048 (Souter, J., dissenting).

Upon reading the *Coeur d'Alene* decision, it is apparent that seven Justices explicitly reject the case-by-case balancing approach espoused by Justice Kennedy in the principal opinion. Accordingly, plaintiffs argue that the principal opinion has no precedential value. The Supreme Court holds that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Marks* v. United States, 97 S.Ct. 990, 993 (1977) (citing *Gregg* v. *Georgia* 96 S.Ct. 2909, 2933 (1976)).

In *Coeur d'Alene*, five Justices found *Ex Parte Young* inapplicable under the particular circumstances of that case. Those same five Justices endorsed parts of the principal opinion in which Justice Kennedy pronounced that the applicability of the *Ex Parte Young* doctrine depends to some degree upon the extent of the federal intrusion on state sovereignty. Because a majority of the Supreme Court appears to endorse this view, this Court will not consider in the present case the extent to which state sovereignty would be threatened by allowing an *Ex Parte Young* to proceed under the 4-R Act.

In the case before this Court, the state obviously has a strong interest with respect to its power to tax property. Taxation has repeatedly been recognized as a central sovereign power of the state. See, e.g., *Arkansas* v. *Farm*

Credit Services of Central Arkansas, 117 S.Ct. 1776, 1780 (1997) ("The State's interest in the integrity of their own processes is of particular moment respecting question of state taxation."); *ACF Industries*, 114 S.Ct. 843, 850-51 (1994) (recognizing state taxation authority as central to state sovereignty). The Board now argues that if plaintiffs were to be afforded an *Ex Parte Young* remedy in this case, the state's sovereign interest in the administration and adjudication of its tax laws would be seriously impacted. Plaintiffs respond that are not seeking to interfere with the state's power to tax; rather they characterize the remedy they seek as merely an order that the state not be allowed to impose an illegal, discriminatory tax.

The Court finds that California's power to assess property taxes in the manner it deems appropriate would be impacted severely if the Court were to allow plaintiffs to proceed with this case under the fiction of *Ex Parte Young*. In addition, Court finds that the power to tax at issue here is every bit as central to state sovereignty as Idaho's interest in the submerged lands in question in *Coeur d' Alene*. Consequently, the Court finds that the nature of the present case is such that a federal court should not involve itself in a challenge to state administrative action. *Cf. Coeur d'Alene*, 117 S.Ct. at 2037-38. Accordingly, the Court holds that plaintiffs may not maintain the present suit against the individual members of the Board under *Ex Parte Young*.[9/]

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9. Although the other two factors in the principal opinion's balancing test have not been embraced by a majority of the Supreme Court, the Court will briefly address their application to the present case.

First, state courts are available in this case to vindicate the federal rights at issue, as the 4-R Act explicitly grants state courts concurrent jurisdiction over suits challenging discriminatory tax assessments on railroad property. See 49 U.S.C. § 11501(c).

Second, state courts are as capable as federal courts of interpreting and enforcing the particular federal right at issue here, the right to be free from discrimination in interstate commerce. *Cf. Couer d'Alene* at 2037 ("A

2. Finality of the Board's Assessments

An issue also arose at the July 18, 1997 hearing as to whether plaintiffs were even seeking prospective injunctive relief, which has always been a prerequisite to maintaining an *Ex Parte Young* suit. On the one hand, plaintiffs argue that the injunction they seek against the collection of future taxes should indeed be considered prospective injunctive relief. On the other hand, the Board argues that plaintiffs are actually seeking retroactive relief regarding assessments for past tax years. The Board further contends that because the assessments are already complete and have been certified to the counties, there is no continuing violation of federal law to enjoin under *Ex Parte Young*. *Cf. Union Pacific*, 949 F. Supp. at 1555.

In order to resolve this issue, the court requested, and thereafter received, supplemental briefing as to the status of the assessment still at issue. According to plaintiffs, the Board's assessments never became final because plaintiffs filed petitions for reassessment for each tax year at issue.[10/] The Board, however, refers the Court to the California Revenue and Taxation Code for the relevant procedures regarding petitions for reassessment. The Board also submits copies of its decisions on the petitions for reassessment at issue here. *See* Board's Request for Judicial Notice.

Under California law, where a petition for reassessment is filed, the assessment does not become final until the earlier of the Board's decision upon the petition or December 31st of the assessment year at issue. *See* Cal. Rev. & Tax. Code §§ 741-744. The evidence submitted by the Board

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doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism"). Thus, the Court finds that applying the *Cf. Couer d'Alene* factors in the present case would result in a finding that the *Ex Parte Young* doctrine is inapplicable.

10. In the Southern Pacific case, tax years 1993, 1994, 1995, and 1996 are at issue. In the Santa Fe case, only 1993 remains at issue, as permanent injunctions have been entered for all other tax years.

indicates that in each of the tax years at issue here, the Board acted upon plaintiffs' petitions for reassessment prior to December 31st of each of the relevant tax years. In addition, the evidence shows that in each instance the Board voted upon the assessments in question prior to or on the same day as the relevant injunctions were entered in the suits before this Court.

The assessments at issue became final under California law on the date on which action was taken by the Board. Thus, the Court finds that plaintiffs are in fact seeking retroactive, rather than prospective injunctive relief with respect to the Board, despite the fact that they are seeking to prospectively enjoin collection of taxes by the Counties. Because any violation of federal law by the Board is complete once the assessments have been finalized, the Court finds that no *Ex Parte Young* remedy is available to plaintiffs against the individual Board members.

C. The County Defendants

Finally, plaintiffs argue that even if this suit is dismissed against the Board and its members, plaintiffs should be permitted to proceed against the Counties, which serve as the tax collectors for the state. The Counties, however, contend that the entire case should be dismissed in the event that the Board is no longer a party because the Board, as the assessor of the taxes in question, is an indispensable party.

Federal Rule of Civil Procedure 19 governs the mandatory joinder of parties to an action. The Court must conduct a two-step analysis in determining whether additional parties must be joined in an action. First, under Rule 19(a), the Court must determine if joinder is feasible and the additional parties are necessary. Second, if the Court determines that the parties are necessary but that joinder is not feasible, it must determine under Rule 19(b) whether the action may continue without the absent parties. The Court does not reach the Rule 19(b) analysis unless it has decided that the parties are necessary under Rule 19(a). *Aguilar* v. *Los Angeles County*, 751 F.2d 1089, 1092 (9th Cir. 1985); *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030, 1042 (9th Cir. 1983).

1. The Board is a Necessary Party and Joinder is Not Feasible

Under the Rule 19(a) analysis, the Court first must determine whether joinder is feasible. Joinder is feasible if the party is subject to service of process and joinder will not deprive the Court of subject matter jurisdiction. Fed. R. Civ. P. 19(a); *Provident Tradesmen B. & T. Co.* v. *Patterson*, 88 S.Ct. 733, 737 (1968). As discussed above, the Court lacks subject matter jurisdiction over the Board, rendering joinder infeasible.

Next, the Court must determine whether the absent party is necessary. An absent party is necessary in two circumstances. First, if in the party's absence the Court is unable to accord complete relief to the parties present, the party is necessary. Fed. R. Civ. P. 19(a)(1). "Complete relief" in the context of Rule 19(a)(1) means that the existing parties can get meaningful recovery for their claims without multiple lawsuits on the same cause of action. *Northrop*, 705 F.2d at 1043. Second, an absent party is necessary if disposition of the case without that party would as a practical matter impair his ability to protect his interests, or would subject existing parties to multiple or inconsistent obligations. Fed. R. Civ. P. 19(a)(2); *see Aguilar*, 751 F.2d at 1089 (interpreting and applying Rule 19(a)(2)).

Plaintiffs' present suits challenge both their past tax assessments and the levying or collection on such assessments by the Counties as violations of § 306. It has been previously established in this case that the tax assessment/collection process works as follows. The Board is the entity which identifies, classifies, assesses, and values plaintiffs' property. The Board then informs the Counties of the assessed valuation for the subject property within their boundaries, and informs the Counties of the value allocated to each tax rate area code appearing upon the roll of each county. The Counties, in turn, levy and collect property taxes for themselves and for each tax rate area code appearing on their rolls in accordance with the assessed values determined by the Board. *See* September 7, 1994 Order in Case No. C-89-4030 DLJ.

Given these circumstances, the Counties first argue that the Board is a necessary party to any § 306 suit because the Board must be available to defend the validity of its assessments. As explained above, in order to find a violation of § 306, the Court must necessarily find that the Board's valuations, upon which the Counties' levy and collection of taxes are based, were improper. Plaintiffs contend that this issue can be easily addressed if the Counties merely subpoena members of the non-party Board as witnesses in a suit challenging the assessments. However, the Court has serious problems with the idea of litigating the propriety of the state's tax assessments in a federal district court proceeding where the state is not even a party.

Moreover, the Court agrees with the Counties' argument that the Board is a necessary party because without the Board, the Counties are likely to be subjected to conflicting obligations. Under California law, the Counties are statutorily required to collect taxes in the amounts established by the Board. However, in the present suit, the Court has enjoined the Counties from collecting those taxes to the extent that they are discriminatory. Thus, if this suit is allowed to proceed without the Board as a party, the Counties will be forced to choose between not collecting the taxes in violation of state law, or collecting the taxes in violation of this Court's orders.

Thus, while plaintiffs argue that they are merely seeking an injunction against the collection of the invalid taxes by the Counties, for the reasons discussed above, the Court finds that the Counties' obligations are inextricably linked to the assessments by the Board. Therefore, the Court finds that the Board is clearly a necessary party under Rule 19(a).

However, as stated above, the Court lacks subject matter jurisdiction over the Board. Consequently, the Court must now decide if the litigation can proceed in the Board's absence.

2. <u>The Board is an Indispensable Party</u>

Once the Court concludes under Rule 19(a) that an absent party is necessary and that joinder is not feasible, it must then determine whether the action can continue in the absence of the necessary party. Rule 19(b) delineates several factors to be considered and requires that the action be

dismissed if it appears in "equity and good conscience" that the absent party is indispensable. Fed. R. Civ. P. 19(b); *see Provident Tradesmen*, 88 S.Ct. 733 (1968) (construing Rule 19(b)).

The Counties argue, based on the factors enumerated in Rule 19(b), that the Board is an indispensable party because (1) a judgment rendered in its absence should be prejudicial to the Board and to the Counties; (2) this prejudice cannot be lessened by the shaping of relief; (3) any judgment rendered in the Board's absence would be inadequate because it would not bind the Board; and (4) plaintiffs have an adequate alternative remedy of filing a 4-R Act suit in state court.

For the reasons discussed in the previous section, the Court agrees with the Counties that the Board is an indispensable party to the present suits. The Court sees no way to satisfactorily eradicate the prejudice to the Board which would invariably result if this litigation were to proceed without the Board as a party. Moreover, as stated above, the Counties would be placed in the untenable position of having to choose between violating either state law or federal law. Because the Court finds that there is no equitable manner in which to resolve these cases without the Board as a party, the Court must dismiss the entire case.

D. Plaintiffs' Motions for Summary Judgment

While all of the remaining plaintiffs have moved for summary judgment, certain of these motions are moot as a result of the Court's finding that the case must be dismissed. Because no final judgments have been issued in either the Southern Pacific case or the Wine Train case, both of those cases will be dismissed for the reasons stated above.[11/]

However, because a final order and a judgment has already been entered by the Court with respect to all of the Santa Fe assessments for tax years 1989 through 1992, the

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11. The Court notes that were it to rule on the Wine Train plaintiffs' summary judgment motion, that motion would be denied on the grounds that the Wine Train plaintiffs are not entitled to relief for tax years not included in their complaint, nor are they entitled to retroactive relief in the form a refund of taxes which have already been paid.

Court shall grant summary judgment for Santa Fe in case No. C-95-3532 DLJ regarding the 1991 Escape Assessment.[12] In addition, because the stipulated injunction with respect to tax year 1993 became permanent when the Ninth Circuit dismissed the Board's appeal, the Court grants summary judgment for Santa Fe with respect to the 1993 NURPEFAR assessment as well.

III. CONCLUSION

For the foregoing reasons, the Court hereby ORDERS as follows:

(1) Southern Pacific Case No. C-89-3603 DLJ is hereby DISMISSED for lack of jurisdiction;

(2) Wine Train Case No. C-94-1199 DLJ is hereby DISMISSED for lack of jurisdiction;

(3) Summary judgment is hereby GRANTED for Santa Fe in Case No. C-89-4030 DLJ and Case No. C-95-3532 DLJ.

(4) The prevailing parties in each of these actions shall file proposed judgments consistent with this order within thirty days of the date of this order. Any party may file comments regarding these proposed judgment within two weeks of the filing of the proposed judgments.

IT IS SO ORDERED.
Dated: October 28, 1997.

D. Lowell Jensen
United States District Judge

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12. At the hearing, the Board raised a question as to whether the permanent injunction and judgment in Case No. C-89-4030 DLJ applies to NURPEFAR commuter property for years other than 1992. The Court now clarifies that the injunction and judgment apply to all Santa Fe NURPEFAR property for *all* tax years between 1989 and 1992.

SOUTHERN PACIFIC, TRANSPORTATION CO., Plaintiffs, v. STATE BOARD OF EQUALIZATION, et al., Defendants.	No. C-89-3603 DLJ Master Consolidated No. C-81-4365 DLJ

I. BACKGROUND

On October 28, 1997, the Court issued an Order dismissing Case No. C-89-3603. The Court concluded that defendant State Board of Equalization ("SBE") was entitled to Eleventh Amendment immunity. In addition, the Court held that the entire case should be dismissed, since SBE was an indispensable party to the litigation and could not be joined because of its Eleventh Amendment immunity.

The Order directed the prevailing defendants to submit a proposed final judgment. On December 1, 1997, defendant SBE submitted a proposed judgment. Consistent with the Court's Order, defendant's proposed judgment would dismiss this action in its entirety. Plaintiff filed objections to the defendant's proposed judgment on December 16, 1997. Plaintiff objects to the dismissal of its case as to defendant Counties. Defendant Counties filed a response to plaintiff's objections on December 17, 1997.

II. DISCUSSION

Plaintiff objects to the dismissal of its entire case, urging the Court to limit the dismissal to defendant SBE. Plaintiff advances several arguments to support its position. First, plaintiff contends that dismissal as to the Counties would be procedurally improper. Second, plaintiff disputes the Court's conclusion that SBE is an indispensable party in this action against the Counties. Third, plaintiff argues that, even if SBE is an indispensable party, dismissal of the case against the Counties would be inappropriate.

A. Plaintiff's Procedural Argument

Plaintiff contends that it would be improper to dismiss the Counties from this action without giving plaintiff a further opportunity to be heard on the Rule 19 issue. Plaintiff notes that the Counties did not plead failure to join and indispensable party as a defense in their answer, never sought to amend their answer to raise this defense, and never filed a motion to dismiss on this basis. Instead, the Counties raised the issue in their opposition to plaintiff's motion for leave to amend its complaint to name individual SBE members as defendants. Thus, according to plaintiff, the issue has not been properly brought before the Court and therefore cannot be part of any judgment issued at this time.

Plaintiff is incorrect when it asserts, with no citation to authority, that "[f]ailure to join an indispensable party is an affirmative defense that must be pled[.]" In fact, failure to join an indispensable party is not waived simply because it is not pled. Instead, failure to join an indispensable party is nonwaivable, see Federal Rule of Civil Procedure 12 (h) (2), and can even be raised for the first time on appeal. McShan v. Sherrill, 283 F.2d 462, 464 (9th Cir. 1960). Moreover, failure to join an indispensable party can be raised by the Court sua sponte. See McCowen v. Jamieson, 724 F.2d 1421, 1424 (9th Cir. 1984). Accordingly, this Court is no precluded from dismissing the instant case simply because no formal motion to dismiss based on failure to join an indispensable party was filed.

Although no obligated to consider further briefing on this issue, the Court would do so it if appeared that the parties had not had an adequate opportunity to address the issue in their papers and at oral argument. However, in this case, both the Counties and plaintiff have had such an opportunity. Plaintiff's reply brief, dated May 27, 1997, filed in support of its motion for leave to amend, directly addressed the precise issue that plaintiff now claims it has not had adequate opportunity to address. See So. Pac's Reply Brief at 5-10. In addition, plaintiff argued the merits of the issue at the July 18, 1997 hearing. In light of these facts, the Court cannot agree that it is procedurally barred from entering judgment in favor or the Counties.

B. Plaintiff's Substantive Arguments

Plaintiff disputes the Court's conclusions that SBE is an indispensable party to this lawsuit and that, without SBE as a defendant in this case, the entire case must be dismissed. Plaintiff is, in essence, asking the Court to reconsider the conclusions reached in the Court's October 28 Order. Yet plaintiff's request fails to comply with the procedure for seeking reconsideration under Civil Local Rule 7-9. That rule requires plaintiff to file a motion for leave to file a motion for reconsideration. In addition, the rule specifically prohibits repetition of "any oral or written argument made by the applying party in support of or in opposition to the interlocutory order which the party now seeks to have reconsidered." Civ. Local Rule 7-9(c). Despite this rule, plaintiff merely repeats arguments already presented to the Court in an effort to challenge the Court's ruling.

Plaintiff may argue that it was entitled to raise these issues since the October 28, 1997 Order invited "any party [to] file comments regarding [the] proposed judgments within two weeks of the filing of the proposed judgments." However, this was not an invitation to plaintiff to reargue the substance of the Court's Order. Instead, the Court was merely offering plaintiff an opportunity to comment on whether the judgment proposed by defendants was consistent with the Court's Order. Plaintiff cannot seize this opportunity to reargue an issue that was briefed by the parties, argued at oral argument and thoroughly addressed in this Court's October 28 Order. Accordingly, the Court hereby REJECTS plaintiff's "Objections" to the entry of judgment dismissing this entire action.

IT IS SO ORDERED.
Dated: February 2, 1998.

D. Lowell Jensen
United States District Judge

SOUTHERN PACIFIC TRANSPORTATION CO., Plaintiffs, v. STATE BOARD OF EQUALIZATION, et al., Defendants.	No. C-89-3603 DLJ Master Consolidated No. C-81-4365 DLJ JUDGMENT

Pursuant to the Court's Order issued on October 28, 1997, the Court hereby enters judgment in favor of all defendants and against plaintiff Southern Pacific Transportation Co..

IT IS SO ADJUDGED.

Dated: February 2, 1998.

Lowell Jensen
United States District Judge

ENTERED: 2/3/98

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation.,	MASTER CONSOLIDATED No. C-81-4365 DLJ
Plaintiffs,	No. C-89-3603 DLJ
v.	JUDGMENT ON MANDATE
STATE BOARD OF EQUALIZATION, et al.,	
Defendants.	

Pursuant to the Order of the United States Court of Appeals for the Ninth Circuit, and the record herein, the motion for entry of judgment of mandate, the motion for summary judgment, the response thereto, the reply and the arguments of counsel,

IT IS HEREBY ORDERED:

That judgment be entered in favor of plaintiff, Southern Pacific Transportation Company and against all defendants.

That the preliminary injunctions previously entered for the 1993 through 1996 tax years are now permanent.

That there is no reason for delay and judgment is entered at this time.

DONE IN OPEN COURT THIS _____ day of _____, 1998.

_____

The Honorable D. Lowell Jensen
Judge of the United States District Court
Northern District of California

APPENDIX C

APPENDIX C

OREGON SHORT LINE RAILROAD COMPANY, Union Pacific Railroad Company; Oregon-Washington Railroad & Navigation Co., Plaintiffs-Appellees,

v.

DEPARTMENT OF REVENUE OREGON; State of Oregon, Defendants-Appellants.

UNION PACIFIC RAILROAD COMPANY; Oregon Short Line Railroad Company; Oregon-Washington Railroad & Navigation Co., Plaintiffs-Appellees,

v.

DEPARTMENT OF REVENUE OREGON; State of Oregon, Defendants-Appellants.

UNION PACIFIC RAILROAD COMPANY; Oregon-Washington Railroad & Navigation Co., Oregon Short Line Railroad Co., Plaintiffs-Appellees,

v.

DEPARTMENT OF REVENUE OREGON; State of Oregon, Defendants-Appellants.

UNION PACIFIC RAILROAD COMPANY and its lessors; Oregon-Washington Railroad & Navigation Company, and Oregon Short Line Railroad Company, Plaintiffs-Appellees,

v.

DEPARTMENT OF REVENUE OREGON; State of Oregon, Defendants-Appellants.

OREGON SHORT LINE RAILROAD COMPANY; Union Pacific Railroad Company; Oregon-Washington Railroad & Navigation Co., Plaintiffs-Appellees,

v.

DEPARTMENT OF REVENUE OREGON, Defendant-Appellant.

OREGON SHORT LINE RAILROAD COMPANY; Union Pacific Railroad Company; Oregon-Washington Railroad & Navigation Co., Plaintiffs-Appellants,

v.

DEPARTMENT OF REVENUE OREGON, Defendant-Appellee.

OREGON SHORT LINE RAILROAD COMPANY; Union Pacific Railroad Company; Oregon-Washington Railroad & Navigation Co., Plaintiffs-Appellants,

v.

DEPARTMENT OF REVENUE OREGON; State of Oregon, Defendants-Appellees.

UNION PACIFIC RAILROAD COMPANY; Oregon Short Line Railroad Company; Oregon-Washington Railroad & Navigation Co., Plaintiffs-Appellants,

v.

DEPARTMENT OF REVENUE OREGON; State of Oregon, Defendants-Appellees.

OREGON SHORT LINE RAILROAD COMPANY; Union Pacific Railroad Company; Oregon-Washington Railroad & Navigation Co., Plaintiffs-Appellants,

v.

DEPARTMENT OF REVENUE OREGON; State of Oregon, Defendants-Appellees.

OREGON SHORT LINE RAILROAD COMPANY; Union Pacific Railroad Company; Oregon-Washington Railroad & Navigation Co., Plaintiffs-Appellants,

v.

DEPARTMENT OF REVENUE OREGON; State of Oregon, Defendants-Appellees.

Nos. 97-35025, 97-35088, 97-35089, 97-35113, 97-35181 to 97-35186.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 4, 1998.

Decided March 23, 1998.

Railroads brought suits against State of Oregon and its Department of Revenue, seeking declaratory and injunctive relief under Railroad Revitalization and Regulatory Reform Act, alleged that State had discriminated against them by overvaluing their rail transportation property and further discriminated in assessing taxes on that property by using 100% of property's true market value, rather than 88% of true market value which was applied to other commercial and industrial property in Oregon. The United States District Court for the District of Oregon, Malcolm F. Marsh, J., found discrimination and ruled that railroads were entitled to interest from State on amounts they had overpaid, but had to pay Oregon's statutory interest rate, rather than the lower federal interest rate, on disputed taxes which had not previously been paid into escrow accounts. State and railroads appealed. The Court of Appeals, Fernandez, Circuit Judge, held that: (1) State did not waive its Eleventh Amendment immunity; (2) Supreme Court's Seminole Tribe decision applied retroactively; (3) Act properly abrogated State's Eleventh Amendment immunity; and (4) railroads were properly assessed Oregon's statutory interest rate.

Affirmed.

[1] FEDERAL COURTS k776
170Bk776
Whether state is immune from suit under Eleventh Amendment is question of law, reviewed de novo. U.S.C.A. Const.Amend. 11.

[2] FEDERAL COURTS k776
170Bk776
Legal issues regarding appropriate interest rate to apply to unpaid taxes are reviewed de novo.

[3] FEDERAL COURTS k265
170Bk265

Under Eleventh Amendment, neither citizens of other states nor state's own citizens can sue it in federal court. U.S.C.A. Const.Amend. 11.

[4] FEDERAL COURTS k265
170Bk265
Congress cannot rely upon Commerce Clause as source of abrogation of Eleventh Amendment because Eleventh Amendment restricts judicial power under Article III, and Article I cannot be used to circumvent constitutional limitations placed upon federal jurisdiction. U.S.C.A. Const. Art. 1, § 8, cls. 2, 3; Art. 3, § 1 et seq.; Amend. 11.

[5] FEDERAL COURTS k266.1
170Bk266.1
State of Oregon did not waive its Eleventh Amendment immunity by participation in Railroad Revitalization and Regulatory Reform Act suit against it until Supreme Court decided Seminole Tribe case, at which time State promptly attacked jurisdiction. U.S.C.A. Const.Amend. 11; 49 U.S.C.A. § 11501.

[6] FEDERAL COURTS k266.1
170Bk266.1
State of Oregon did not waive its Eleventh Amendment immunity against Railroad Revitalization and Regulatory Reform Act suit, by enacting statutes providing for method of repayment of refunds ordered by courts, including any federal court, and providing for method of allocation of tax payments where assessment was being appealed to federal courts; statutes merely facilitated dealing with a process which threatened to go forward whether State liked it or not. U.S.C.A. Const.Amend. 11; 49 U.S.C.A. § 11501; ORS 311.813; Or.Laws 1997, c. 293, § 9.

[7] COURTS k100(1)
106k100(1)
When Supreme Court applies federal law ruling to parties before it, that rule has full retroactive effect to all cases which are not yet final; even if proceedings at district court

have been completed, rule applies if case is still pending on direct review.

[8] FEDERAL COURTS k759.1
170Bk759.1
Court of Appeals may affirm on any basis record supports, including one district court did not reach.

[8] FEDERAL COURTS k762
170Bk762
Court of Appeals may affirm on any basis record supports, including one district court did not reach.

[9] CONSTITUTIONAL LAW k229(1)
92k229(1)
Railroad Revitalization and Regulatory Reform Act, authorizing rail carriers to challenge state tax as discriminatory, properly abrogated State's Eleventh Amendment immunity; Congress intended to abrogate States' immunity when it passed the Act, and Act was appropriate legislation to enforce Equal Protection Clause. U.S.C.A. Const.Amends. 11, 14, § 5; 49 U.S.C.A. § 11501(c).

[9] FEDERAL COURTS k265
170Bk265
Railroad Revitalization and Regulatory Reform Act, authorizing rail carriers to challenge state tax as discriminatory, properly abrogated State's Eleventh Amendment immunity; Congress intended to abrogate States' immunity when it passed the Act, and Act was appropriate legislation to enforce Equal Protection Clause. U.S.C.A. Const.Amends. 11, 14, § 5; 49 U.S.C.A. § 11501(c).

[10] INTEREST k31
219k31
Upon conclusion of suit under Railroad Revitalization and Regulatory Reform Act challenging Oregon taxes as discriminatory, railroads were properly assessed Oregon statutory interest rate on amount of overdue taxes that they had neither paid over to State nor deposited in district court ordered escrow account; railroads were able to retain full use

of their money while exercising their rights under the Act. 49 U.S.C.A. § 11501(c); ORS 311.500.

***1262** Richard D. Wasserman, Office of the Attorney General, Salem, Oregon, for appellants.

Eugene A. Ritti, Hawley Troxell Ennis & Hawley LLP, Boise, Idaho, for appellees-cross-appellants.

Appeals from the United States District Court for the District of Oregon; Malcolm F. Marsh, District Judge, Presiding. D.C. Nos. CV-91-00954-MA, CV-93-01013-MA, CV-93-00097-MA, CV-92-00915-MFM, CV-85-02102-MA and CV-92-00915- MA.

Before: FERNANDEZ, RYMER, and TASHIMA, Circuit Judges.

FERNANDEZ, Circuit Judge:

Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad and Navigation Company (collectively "the Railroads"), [FN1] brought a number of actions against the Department of Revenue of the State of Oregon and the State of Oregon (collectively "the State") in which the Railroads sought declaratory and injunctive relief under § 306 of the Railroad Revitalization and Regulatory Reform Act (4-R Act). See 49 U.S.C. § 11501. After years of litigation the State moved the district court to dismiss for lack of subject matter jurisdiction. The State argued that in light of the Supreme Court's decision in Seminole Tribe v. Florida, 517 U.S. 44, 71-72, 116 S.Ct. 1114, 1131, 134 L.Ed.2d 252 (1996), it was immune under the Eleventh Amendment to the United States Constitution. The district court denied the motion and entered judgment against the State. The Railroads disputed the district court's ruling that they must pay Oregon's statutory interest rate, rather than the lower federal interest rate, on disputed taxes which had not previously been paid into escrow accounts. Both the State and the Railroads appealed. We affirm.

FN1. Oregon Short Line Railroad Company and Oregon-Washington Railroad and Navigation Company are wholly owned subsidiaries of Union Pacific Railroad Company. They own lines of railroad, which Union Pacific actually operates.

BACKGROUND

The Railroads filed a number of actions against the State in which they alleged that the State had discriminated against them by overvaluing their rail transportation property and further discriminated in assessing the taxes on that property by using 100% of the property's true market value, rather than the 88% of true market value which was applied to other commercial and industrial property in Oregon.

The actions were brought pursuant to § 306 of the 4-R Act. See 49 U.S.C. § 11501. [FN2] These claims were tried before a magistrate judge in September of 1991, and the district court adopted the magistrate judge's findings of fact and conclusions of law and entered a judgment on the claims on September 2, 1992. Another claim regarding the personal property tax had been bifurcated and awaited final resolution at some later time. That claim, therefore, remained open, and the court did not direct the entry of judgment pursuant to Federal Rule of Civil Procedure 54. Meanwhile, litigation related to the Railroads' personal property claim was wending its way through the courts, and was finally disposed of when we issued our decision regarding the interest rate that had to be paid by the Railroads on tax monies which had been kept in escrow accounts rather than actually turned over to the State. See MHC, Inc. v. Oregon Dep't of Revenue, 66 F.3d 1082 (9th Cir.1995). In MHC, we held that the State could not collect 16% interest on the funds that had been deposited in the escrow account, and that it was limited to the lower federal interest rate on money judgments ***1263** provided by 28 U.S.C. § 1961. See id, at 1090-91.

FN2. The language of the original § 306, first codified at 49 U.S.C. § 26c (1976 ed.) was slightly

revised when the provision was recodified in 1978 (49 U.S.C. § 11503) and then again in 1995 (49 U.S.C. § 11501). The revisions were not intended to make a substantive change in the law. See Burlington N. R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 457 n. 1, 107 S.Ct. 1855, 1858 n. 1, 95 L.Ed.2d 404 (1987) (1978 revision " 'may not be construed as making a substantive change in the laws replaced' "); H.R. Conf. Rep. No. 104-422, at 878 (1995) ("This provision (11301) replaces without substantive change former section 11503."). For convenience, further citations to the statute refer to the text of its current version in 49 U.S.C. § 11501, and all references to § 11501 are to 49 U.S.C. § 11501.

On April 8, 1996, after the MHC ruling came down, the district court held a conference with the parties regarding this litigation. Because the Railroads had paid the 16% statutory interest rate when the escrow accounts were disbursed, the State owed them a refund. The Railroads informed the court that they were dismissing all of the claims still at issue. Both parties also reported an agreement on the procedure to be used in performing interest calculations in compliance with MHC. The district court set a "final paper call" for June 14, 1996.

However, events were then outstripping this litigation because on March 27, 1996, the Supreme Court had decided Seminole Tribe. Based upon that decision, the State filed its motion to dismiss this action on April 22, 1996, because, it argued, it had Eleventh Amendment immunity from suit under the 4-R Act and the court had "no jurisdiction to hear further proceedings.". [FN3] The district court denied the motion because, it declared, the State had waived its immunity and Seminole Tribe should not apply retroactively to this case.

FN3. At oral argument the State confirmed that it was asserting its immunity only in order to preclude proceedings after March 27, 1996, and was not

seeking to attack earlier decisions, orders or settlements.

The reserved personal property issues, however, still remained unresolved. They were finally decided when the district court ruled that the Railroads were entitled to interest from the State on amounts that they had overpaid, but that the Railroads were not entitled to relief from Oregon's 16% interest rate on taxes that they had not paid or escrowed at all. A final judgment was entered on December 3, 1996, and this appeal followed.

JURISDICTION AND STANDARD OF REVIEW

Unless the Eleventh Amendment precludes it, the district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 49 U.S.C. § 11501(c). We have jurisdiction pursuant to 28 U.S.C. § 1291.

[1][2] "Whether a state is immune from suit under the Eleventh Amendment is a question of law and is reviewed de novo." Micomonaco v. Washington, 45 F.3d 316, 319 (9th Cir.1995). Similarly, we will review the legal issues regarding the appropriate interest rate to apply to unpaid taxes de novo. Cf. MHC, 66 F.3d at 1090-91 (clearly deciding a similar interest rate issue as a matter of law without expressly saying so).

DISCUSSION

In § 11501(b), Congress declared that certain actions "unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them...." It then went on to provide that "[n]otwithstanding section 1341 of title 28 [the Anti-injunction Act] and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section." 49

U.S.C. § 11501(c). There is no dispute that Congress truly intended to confer jurisdiction upon the district courts in actions against states for the purpose of precluding the discrimination which Congress had found. Cf. ACF Indus., Inc. v. Department of Revenue, 961 F.2d 813, 816 (9th Cir.1992), rev'd on other grounds, 510 U.S. 332, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994). The major issue before us is whether, in light of Seminole Tribe, Congress could constitutionally do so. If it could, we can go on to decide the subsidiary interest rate issue raised by the Railroads.

A. The Constitutionality of § 11501(c)

[3][4] The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Of course, that means that neither citizens of other states nor a state's own citizens can sue it in federal court. See Idaho v. Coeur *1264 d'Alene Tribe, --- U.S. ----, ----, 117 S.Ct. 2028, 2033, 138 L.Ed.2d 438 (1997). Thus we give states the "dignity and respect" to which they are entitled. Id. But there are exceptions to that immunity. As we have said, "Congress can abrogate the Eleventh Amendment without the consent of the states in certain instances or a state may waive its immunity by consenting to suit in federal court." Micomonaco, 45 F.3d at 319. We all now know that Congress cannot rely upon the Commerce Clause as a source of abrogation of the Eleventh Amendment because "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." Seminole Tribe, 517 U.S. at 71-74, 116 S.Ct. at 1131-32. We have known that since March 27, 1996, when Seminole Tribe was decided.

The Railroads first challenge the State's claim that the district court had no jurisdiction by pointing to the waiver exception, and then go on to argue that Seminole Tribe should not be applied to this case at all. We must first

decide whether these non-constitutional grounds uphold the district court's decision and will only turn to the constitutional challenge, if these grounds fail. See Jean v. Nelson, 472 U.S. 846, 854, 105 S.Ct. 2992, 2997, 86 L.Ed.2d 664 (1985); Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1474 (9th Cir.1994). As we will demonstrate, the non-constitutional grounds cannot do tasks that the Railroads have assigned to them.

(1) Waiver

[5] The Railroads assert that the State waived its Eleventh Amendment immunity for all purposes because it actively participated in this litigation up to the time that Seminole Tribe was decided. While we will say a bit more about our reasoning, we essentially disposed of this claim when we held that:

> The State's failure to raise an immunity defense before the district court, at a time where it was clearly foreclosed by Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) [the case overruled by Seminole Tribe], is far from an express or implied waiver. Given the lack of any other evidence establishing waiver, review by a federal court is foreclosed.

Quillin v. Oregon, 127 F.3d 1136, 1139 (9th Cir.1997); see also Mueller v. Thompson, 133 F.3d 1063, 1064-66 (7th Cir.1998). Here, as in Quillin, the State acceded to the district court's jurisdiction and vigorously participated in this action until Seminole Tribe was decided. Here, as in Quillin, it cannot be said that the State's mere participation was the result of an express or implied waiver. Were we to hold otherwise, we would not be giving proper respect to the requirement that states cannot easily waive their immunity. See Gamboa v. Rubin, 80 F.3d 1338, 1350 (9th Cir.), vacated on other grounds, 101 F.3d 90 (9th Cir.1996) (en banc).

But, argue the Railroads, the State entered into stipulations which formed the bases for consent orders, and that must amount to a waiver. We think not. The Railroads' authority for that proposition rests heavily on two cases. See Mitchell

v. Commission on Adult Entertainment Establishments, 12 F.3d 406, 408-09 (3d Cir.1993); Garrity v. Sununu, 752 F.2d 727, 737-38 (1st Cir.1984). In Mitchell, there was no impediment to asserting immunity, but the state did not appeal the denial of immunity directly. It only sought to raise immunity in a collateral attack on the judgment. See 12 F.3d at 409. Similarly, in Garrity, the state never did object directly to the underlying jurisdiction of the district court, but actually acquiesced and then mounted a collateral attack on a fee award. See 752 F.2d at 737-38. Even if we were to otherwise embrace the holding of those cases, they would be inapposite. Here the State could not raise the issue until Seminole Tribe was decided, and promptly attacked jurisdiction once that decision was handed down.

[6] In a final attempt to use waiver to parry the State's allonge, the Railroads point to the fact that Oregon enacted statutes for the purpose of implementing what then appeared to be a possible conclusion of the litigation process. Oregon provided for the method of repayment of refunds ordered by the courts, including any federal court. See Or.Rev.Stat. § 311.813. It also provided for the method of allocation of tax payments ***1265** where an assessment was being appealed to the federal courts. See 1995 Or. Laws, chapter 293, § 9. But those statutes merely facilitated dealing with a process which threatened to go forward whether the State liked it or not. They are far from stating a waiver in "the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 240, 105 S.Ct. 3142, 3146, 87 L.Ed.2d 171 (1985); see also Clallam County v. Department of Transp., 849 F.2d 424, 426-27 (9th Cir.1988). In fact, the statutes are, again, nothing more than a recognition that the litigation could and would proceed whether the State liked it or no.

Thus, we return to the place where we started, Quillin, 127 F.3d at 1139, and find the State's various actions to be "far from an express or implied waiver." Because prior to Seminole Tribe the State was forced to participate in these proceedings, we would expect it to have done so in good

faith and with vigor. It was not forced into the Hobson's choice of either refusing to fully participate in the litigation or waiving its immunity for all future proceedings when it participated in this litigation. [FN4]

> FN4. As we noted previously, the State's attack is limited to post- Seminole Tribe proceedings.

(2) Retroactivity

[7] The Railroads essentially argue that Seminole Tribe does not apply to this case because when that case was decided most of the issues in this case had already been determined. We are satisfied that the "most of the issues" argument is not supportable. The rule is that when the Supreme Court applies a federal law ruling to the parties before it, that rule has full retroactive effect to all cases which are not yet final. See Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97, 113 S.Ct. 2510, 2517, 125 L.Ed.2d 74 (1993); United States v. Real Property Located At 20832 Big Rock Drive, 51 F.3d 1402, 1406 (9th Cir.1995). Even if proceedings at the district court have been completed, the rule applies if the case is still pending on direct review. Id. That does not mean that retroactivity ceases to apply when the case is almost final or close to being final. It means that it ceases to apply when the case is final.

Here it is pellucid that the case was not final when Seminole Tribe was decided. The litigation had not ended. Indeed, the district court's ultimate determination on December 3, 1996, was properly labeled as the final judgment. See National Distrib. Agency v. Nationwide Mut. Ins. Co., 117 F.3d 432, 433 (9th Cir.1997); United States v. One 1986 Ford Pickup, 56 F.3d 1181, 1184- 85 (9th Cir.1995).

(3) The Fourteenth Amendment

[8] Because neither waiver nor retroactivity principles will support the district court's determination that it did have jurisdiction, we must turn to the constitutionality issue. The district court did not reach that issue, but we may affirm "on

any basis the record supports, including one the district court did not reach." Herring v. FDIC, 82 F.3d 282, 284 (9th Cir.), cert. denied, --- U.S. ----, 117 S.Ct. 581, 136 L.Ed.2d 512 (1996).

Again, Seminole Tribe made it clear that § 11501(c) cannot be upheld pursuant to Congress' authority under the Commerce Clause--U.S. Const. art. I, § 8, cl. 2. See 517 U.S. at 71-74, 116 S.Ct. at 1131-32. That does not end the discussion because "through the Fourteenth Amendment, federal power [was] extended to intrude upon the province of the Eleventh Amendment and therefore ... § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." Id. at 59, 116 S.Ct. at 1125. As the Supreme Court has pointed out, if Congress "has unequivocally expresse[d] its intent to abrogate the immunity" and if "Congress has acted pursuant to a valid exercise of power," the State's immunity has been effectively abrogated. Id. at 55, 116 S.Ct. at 1123 (internal quotations omitted).

[9] In this case, no one doubts that Congress did intend to abrogate the State's immunity when it enacted § 11501(c). But could it do so? We must answer that question without reference to what Congress did or did not say about the source of its power. We are not called upon to decide whether ***1266** Congress pointed to the right part of the Constitution when it passed this legislation. See Mills v. Maine, 118 F.3d 37, 43 (1st Cir.1997). Rather,

> It is in the nature of our review of congressional legislation defended on the basis of Congress's powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection" for [t]he ... constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.

EEOC v. Wyoming, 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 1064 n. 18, 75 L.Ed.2d 18 (1983) (citations and

internal quotations omitted). For that reason, it matters not that we have previously upheld the statute under the Commerce Clause. See Arizona v. Atchison, Topeka & Santa Fe R.R. Co., 656 F.2d 398, 406-10 (9th Cir.1981). Even though the Commerce Clause can no longer be relied upon, if the Fourteenth Amendment will support the section, that will be quite sufficient. See Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 655-56, 101 S.Ct. 2070, 2076, 68 L.Ed.2d 514 (1981) (an allegedly discriminatory state tax can be challenged under the Commerce Clause, the Privileges and Immunities Clause of art. IV, § 2, and the Equal Protection Clause). Thus, we need only ask whether the statute is appropriate legislation to enforce the Equal Protection Clause.

We have held that:

> a statute is appropriate legislation to enforce the Equal Protection Clause if the statute may be regarded as an enactment to enforce the Equal Protection Clause, [if] it is plainly adapted to that end and [if] it is not prohibited by but is consistent with the letter and spirit of the constitution.

Clark v. California, 123 F.3d 1267, 1270 (9th Cir.1997), petition for cert. filed, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686) (internal quotations omitted); see also Katzenbach v. Morgan, 384 U.S. 641, 650, 86 S.Ct. 1717, 1723, 16 L.Ed.2d 828 (1966). In that regard, we have stated that "Congress's power to pass legislation under the Fourteenth Amendment is very broad." Clark, 123 F.3d at 1270. That is because "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Katzenbach, 384 U.S. at 651, 86 S.Ct. at 1723-24. Interestingly enough, that means that Congress can even "create broader equal protection rights than the Constitution itself mandates." Clark, 123 F.3d at 1270. That does not mean that Congress can go so far as to redefine the very substance of the Constitution itself under the guise of enforcing equal protection concepts. See City of Boerne v. Flores, --- U.S. ----, ----, 117 S.Ct. 2157,

2164, 138 L.Ed.2d 624 (1997). It does mean, however, that Congress can enact legislation which "prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." Id. at ----, 117 S.Ct. at 2163 (internal quotations omitted); see also City of Rome v. United States, 446 U.S. 156, 176, 100 S.Ct. 1548, 1561, 64 L.Ed.2d 119 (1980).

While the area of taxation might not immediately leap to mind when one thinks of equal protection problems, there can be little doubt that discriminatory state taxation can implicate equal protection concerns. States do have broad authority to classify those whom they intend to tax and to impose different tax burdens on different classes. See Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 344, 109 S.Ct. 633, 638, 102 L.Ed.2d 688 (1989); Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 368, 60 S.Ct. 968, 972, 84 L.Ed. 1254 (1940); Southern Ry. Co. v. Greene, 216 U.S. 400, 417, 30 S.Ct. 287, 291, 54 L.Ed. 536 (1910). Nevertheless, the Supreme Court has not hesitated to strike down taxation schemes which do not rest "upon some reasonable consideration of difference or policy...." Allegheny Pittsburgh, 488 U.S. at 344, 109 S.Ct. at 638; see also Southern Ry., 216 U.S. at 417- 18, 30 S.Ct. at 291; cf. Atchison, Topeka, & Santa Fe Ry. Co. v. Vosburg, 238 U.S. 56, 61-62, 35 S.Ct. 675, 676-77, 59 L.Ed. 1199 (1915); Gulf, C. & S.F. Ry. Co. v. Ellis, 165 U.S. 150, 165-66, 17 S.Ct. 255, 261, 41 L.Ed. 666 (1897).

***1267** It is just that type of unreasonable classification and discrimination that § 11501 was designed to correct. The statute itself refers to the unreasonable burdens and discrimination which it intends to eliminate. See § 11501(b). Moreover, as the Supreme Court said in Department of Revenue v. ACF Indus., Inc., 510 U.S. 332, 336, 114 S.Ct. 843, 846, 127 L.Ed.2d 165 (1994):

> When drafting the legislation, Congress was aware that the railroads are easy prey for State and local tax assessors in that they are non-voting, often non- resident, targets for local taxation, who cannot easily remove themselves from the locality. Section 306 of the 4-R Act, ... addresses this

> concern by prohibiting the States (and their subdivisions) from enacting certain taxation schemes that discriminate against railroads.

(internal quotations and citations omitted); see also Burlington Northern, 481 U.S. at 457, 107 S.Ct. at 1858 ("After an extended period of congressional investigation, Congress concluded that 'railroads are over-taxed by at least $50 million each year.' " (citation omitted)). In the face of all of that, it would take an unusual amount of pertinacity to cling to the notion that Congress could not enact § 11501 pursuant to its power under the Fourteenth Amendment. [FN5] Surely, the statute may be regarded as an enactment to enforce the equal protection clause, is consistent with the Constitution, is adapted to its ends, and does not provide remedies which are disproportionate to the desired goal of eliminating discrimination. See City of Boerne, --- U.S. at ----, 117 S.Ct. at 2164. The proportionality of the remedy is underscored by Congress' decision to leave some play in the joints by withholding relief when the disparity of treatment is less than 5%. See § 11501(c).

> FN5. The State, by the way, has not appealed the determination that it did discriminate against the Railroads in just the ways proscribed by Congress.

In fact, the specific actions precluded by § 11501(b) include the assessment of rail transportation property at a higher ratio to true market value than that used for other commercial and industrial property, and imposing a tax that discriminates against rail carriers. At the fringes, some classifications prohibited by § 11501 might have been sustainable against an equal protection challenge in the Supreme Court. See Browning, 310 U.S. at 368-70, 60 S.Ct. at 972 (holding that when a state's method of taxation of railroads and other utilities was historical and not invidious there was no equal protection violation). But, given the problems it saw, Congress could eliminate all railroad specific discrimination, even if it eliminated more practices than the Supreme Court itself would have done. See Clark, 123 F.3d at 1270. Therefore, § 11501 is a constitutionally sound enactment, which abrogated the State's

Eleventh Amendment immunity, because Congress could draw its authority from § 5 of the Fourteenth Amendment.

B. Interest Rate

[10] The Railroads complain that, pursuant to Oregon Revised Statutes Section 311.500, they are being charged interest at the rate of about 16% per annum (1 1/3 percent per month) on the amount of overdue taxes that they had neither paid over to the State nor deposited in a district court ordered escrow account. They support their argument against that interest rate by relying on our decision in MHC, 66 F.3d at 1090, in which we declared that where the deposited taxes had been paid into a court registry or escrow account as a condition of interim equitable relief under § 11501 of the 4-R Act, it would be improper to allow the State to then collect at the 16% interest rate. We explained:

> Were the state to prevail, the railroads would have been both deprived of the use of their funds for a significant period of time and subjected to a substantial economic penalty for placing their funds in escrow pursuant to a court order. Under such a regime, railroads would be strongly discouraged from availing themselves of the remedy afforded by the 4-R Act.

Id. In the case at hand, however, there was no such problem because the Railroads did not pay the disputed amounts into the court registry or into an escrow account. They kept those amounts and used them for their own purposes. They were not at all restrained from exercising their rights under ***1268** the 4-R Act. Rather, they did exercise them and enjoyed the full use of their funds at the same time.

Were that all, this distinction would be an end to the Railroads' claim. It is not all because in a dictum in MHC we also reflected upon the fact that one of the purposes of § 11501(c) is to allow railroads to put off payment of their taxes, while one of the purposes of the 16% interest rate is to encourage railroads to pay up right away. Thus, § 11501(c) and the interest rates can pull in different directions. We said, "[t]his conflict alone would seem to be

sufficient to bar assessment of punitive interest [16% per annum]. However, we need not go that far in this case." Id. at 1089 (citation omitted). The Railroads faced no such conundrum in this case. They were not required to pay over the tax because Oregon did not insist that they do so. See Or.Rev.Stat. § 308.020. Thus, no rights of the Railroads were restrained. They could have paid the disputed amounts into a special county account, had they wanted to do so. See Or.Rev.Stat. § 311.160(3). And if they felt that the choices the State gave them were connected to or helped to foster a form of discrimination, § 11501 itself was available. The Railroads' decision to simply hold on to their money rather than choose another expedient was just that--their choice. We see no reason to allow the Railroads to retain the full use of their money while avoiding the 16% interest rate. We, therefore, affirm the district court's denial of relief from that rate.

CONCLUSION

After more than a decade of litigation over its taxation of the Railroads, the State believed that the Supreme Court had given it a handsel when Seminole Tribe was decided. If § 11501 of the 4-R Act depended on the Commerce Clause for its validity, the State would have been right. As it is, Seminole Tribe cannot deliver the State from its woe because the constitutional validity of § 11501 rests on the Equal Protection Clause of the Fourteenth Amendment. Thus, Congress properly abrogated the State's Eleventh Amendment immunity, and the district court had jurisdiction over these cases.

AFFIRMED.

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APPENDIX D

APPENDIX D

CONSTITUTION OF THE STATE OF CALIFORNIA
1879
ARTICLE XIII. TAXATION

§ 19. Pipelines, flumes, and other waterways within two or more counties; railroad and utilities properties; periodic assessment; restrictions or changes; delegation of duties

Sec. 19. The Board shall annually assess (1) pipelines, flumes, canals, ditches, and aqueducts lying within 2 or more counties and (2) property, except franchises, owned or used by regulated railway, telegraph, or telephone companies, car companies operating on railways in the State, and companies transmitting or selling gas or electricity. This property shall be subject to taxation to the same extent and in the same manner as other property.

No other tax or license charge may be imposed on these companies which differs from that imposed on mercantile, manufacturing, and other business corporations. This restriction does not release a utility company from payments agreed on or required by law for a special privilege or franchise granted by a government body.

The Legislature may authorize Board assessment of property owned or used by other public utilities.

The Board may delegate to a local assessor the duty to assess a property used but not owned by a state assessee on which the taxes are to be paid by a local assessee.

REVENUE AND TAXATION CODE
DIVISION 1. PROPERTY TAXATION

§ 721. Pipelines, flumes, etc.; railroads and utilities; annual assessment and valuation

The board shall annually value and assess all of the taxable property within the state that is to be assessed by it pursuant to Section 19 of Article XIII of the Constitution and any legislative authorization thereunder.

§ 722. State-assessed property; assessment formula; preparation of roll

State-assessed property shall be assessed at its fair market value or full value as of 12:01 a.m. on the first day of January. The board shall annually prepare an assessment roll of the assessments made by it for transmittal to county auditors and city auditors as hereinafter provided in this chapter.

§ 731. Unitary property valuation; notice of assessed value; declaration of intent to petition and petition for reassessment

Each year between the first day of January and the first day of June, upon valuing the unitary property of an assessee, the board shall mail to the assessee, at its address as shown in the records of the board, a notice stating the amount of the assessed value of the assessee's unitary property. The notice shall advise the assessee of the date by which and the place where a declaration of intent to petition for reassessment, and the date by which and place where a petition for reassessment of the unitary property may be filed. The date for filing of the declaration of intent shall not be less than 20 days from the date of the mailing of the notice of value and the date for filing the petition shall not be less than 30 days from the date set for filing the declaration of intent to petition.

§ 732. Nonunitary property valuation; notice of assessed value; declaration of intent to petition and petition for reassessment

Each year between the first day of January and the last day of June, upon valuing the nonunitary property of an assessee, the board shall mail to the assessee at its address shown in the records of the board a notice stating the amount of the assessed value of the assessee's nonunitary property. The notice shall advise the assessee of the date by which and the place where a declaration of intent to petition for reassessment, and the date by which and place where a petition for reassessment of the nonunitary property may be filed. The date for filing of the declaration of intent shall not be less than 20 days from the date of the mailing of the notice of value and the date for filing the petition shall not be less than 30 days from the date set for filing of the declaration of intent to petition.

§ 733. Failure to file declaration of intent or failure to file petition for reassessment; finality of assessment; extension upon written request

If the assessee fails to file a declaration of intent to file a petition for reassessment within the period specified in the notice mailed by the board in accordance with Section 731 or Section 732, an assessment of unitary or nonunitary property of the assessee shall become final at the expiration of the period specified. If the assessee files a petition for reassessment within the period specified for filing a declaration of intent to petition, no declaration of intent need be filed.

If, after a declaration of intent to file a petition has been timely filed, a timely petition for reassessment is not filed with the board, an assessment of unitary or nonunitary property of an assessee shall become final at the expiration of the period specified for filing a petition in

the notice given in accordance with Section 731 or Section 732.

The board may extend the period for filing a petition for reassessment once for a period not to exceed 15 days, provided a written request for the extension is filed with the board prior to the expiration of the period for which the extension may be granted.

§ 741. Petition for reassessment; grounds; delivery

A petition for reassessment of unitary or nonunitary property shall be in writing and shall state the specific grounds upon which it is claimed a correction or adjustment of the assessment is founded. The petition shall be delivered to the board at its headquarters office in Sacramento.

§ 742. Time and place of hearings; reassessment petitions; notice

Upon receipt of a timely petition for reassessment, the board shall set a time and place within the state for hearing on the petition. Notice thereof shall be mailed to the assessee at its address as shown in the records of the board, not less than 10 working days in advance of the date of the hearing.

§ 743. Hearings; continuation; open to public; record; transcript

The hearing may be continued by the board for good cause. The hearing shall be open to the public, except that upon conclusion of the taking of evidence the board may deliberate in private with the aid of its staff in reaching a conclusion. Upon written request, the board shall make a full record of the hearing and furnish the petitioner with a transcript thereof at the petitioner's expense.

§ 744. Notice of decision on petition for reassessment; findings and conclusion; time for completion of decisions; correct value

(a) The board shall notify the petitioner of its decision on a petition for reassessment by mail and shall make written findings and conclusions if requested at or prior to the commencement of the hearing. The board shall send a periodic report of its decisions and any written findings and conclusions thereon to each county in which affected state-assessed property is situated. The findings shall fairly disclose the board's determination of material factual issues and shall contain a statement of the method or methods of valuation used by the board in valuing the property. Notwithstanding the requirement for a statement of method or methods, the board's approval of a settlement of a lawsuit contesting the value of state-assessed property shall be sufficient disclosure when value is determined in accordance with a board- approved settlement. Decisions of the board on petitions for reassessment of state-assessed property shall be completed on or before December 31.

(b) When the value of an assessee's state-assessed property is determined, after a hearing on a petition for reassessment, to be different from the value originally adopted by the board, the board shall determine the year in which the corrected value is to be entered on the roll. The correct value may be entered on the roll for the fiscal year in which the determination is made, or the difference between the original and the corrected value may be entered as an increase or decrease in the assessment for the succeeding fiscal year. If the corrected value is entered on the roll for the fiscal year in which it is determined, and the board roll has been transmitted to the county auditors, the board shall make the corresponding changes in allocations and transmit the roll corrections to the county auditor.

(c) If the amount of the correction is to be entered on the roll for the succeeding fiscal year, an amount is to be added in lieu of interest. If the correction results in a reduction in assessed value, there shall be added to the reduction, in lieu of interest, 9 percent of the difference between the original assessed value and the reduced assessed value. If the correction results in an increase in assessed value, there shall be added to the increase, in lieu of interest, 9 percent of the difference between the original assessed value and the increased assessed value.

§ 755. Estimate of total unitary and operation nonunitary value of state- assessed property; counties and revenue districts; transmission to county auditors, inspection

(a) On or before July 15, the board shall transmit to each county auditor an estimate of the total unitary value and operating nonunitary value of state- assessed property in the county and of nonunitary state-assessed property in each revenue district in the county. An estimate need not be made for a revenue district that did not levy a tax or assessment during the preceding year unless the board receives on or before January 1 preceding the fiscal year for which the levy is to be made a notice in writing of the proposed levy. The estimate shall be regarded as establishing the total assessed value of state- assessed property in the county and each revenue district in the county for the purpose of determining tax rates, subject only to such changes as may be transmitted on or prior to July 31. All information furnished pursuant to this section is at all times during office hours open to inspection of any interested person or entity.

(b) Notwithstanding subdivision (a), in making the estimate referred to in subdivision (a), the unitary value and nonunitary value of the property of regulated railway companies and property subject to subdivision (i) of Section 98.9 shall be allocated by revenue district.

§ 756. Transmission of roll to county auditors; contents; estimate of total assessed value of state-assessed property; statement of roll change

(a) On or before July 31, the board shall transmit to each county auditor a roll showing the unitary and operating nonunitary assessments made by the board in the county and the nonoperating nonunitary assessments made by the board in each city and revenue district in the county; provided, however, that the roll need not show the assessments made by the board in a revenue district which did not levy a tax or assessment during the preceding year. Such roll is at all times, during office hours, open to the inspection of any person representing any taxing agency or revenue district, or any district described in Section 2131. If the roll does not show the assessments in a revenue district as herein provided and a notice of a proposed levy is furnished the board in writing, on or before January 1 preceding the fiscal year for which the levy is to be made, the board shall furnish an estimate of the total assessed value of nonoperating nonunitary state-assessed property in the district and shall transmit thereafter to the county auditor a statement of roll change showing the nonoperating nonunitary assessments made by the board in the district.

(b) Notwithstanding subdivision (a), in making the roll referred to in subdivision (a), the unitary value and nonunitary value of the property of regulated railway companies and property subject to subdivision (i) of Section 98.9 shall be enrolled by revenue district.

§ 2601. Secured roll; delivery to collector; auditor's affidavit; machine-prepared roll or roll retained in electronic data-processing equipment; procedure

(a) On or before the fourth Monday in September, the auditor shall deliver the secured roll to the tax collector, with an affixed affidavit, subscribed by him, as follows:

"I, _____, Auditor of _____ County, swear that I received the assessment roll from the assessor, with his affixed affidavit; that I have corrected it as required by the State Board of Equalization; and that I have reckoned the respective sums due as taxes and have added the columns of valuations and taxes, as required by law."

If the roll is a machine-prepared roll, the auditor shall deliver the assessment roll to the assessor and shall deliver the roll on which he has extended taxes to the tax collector, with an affixed affidavit, subscribed by him, as follows:

"I, _____, Auditor of _____ County, swear that the attached roll is a reproduction of the roll prepared by the assessor and corrected by the State Board of Equalization; and that I have reckoned the respective sums due as taxes and have added the columns of valuations and taxes as required by law."

(b) If the roll is a machine-prepared roll, and the tax bills are, with the consent of the tax collector and the approval of the board of supervisors, also machine-prepared by the auditor, the auditor shall, on or before the fourth Monday in September, deliver the assessment roll to the assessor, and shall, on or before October 16, deliver the roll on which he has extended taxes to the tax collector, with an affixed affidavit, subscribed by him, as follows:

"I, _____, Auditor of _____ County, swear that the attached roll is a reproduction of the roll prepared by the assessor and corrected by the State Board of Equalization; and that I have reckoned the respective sums due as taxes and have added the columns of valuations and taxes as required by law."

(c) If the extended roll is retained in electronic data-processing equipment and no physical document is prepared and if the tax bills are, with the consent of the tax collector and the approval of the board of supervisors, machine prepared, the auditor shall, on or before the

fourth Monday in September, deliver the assessment roll to the assessor, and shall, on or before October 16, deliver the completed tax bills to the tax collector with an affidavit, subscribed by him, as follows:

"I, _____, Auditor of _____ County, swear that the tax bills herewith submitted to you are the result of extending the roll prepared by the assessor and corrected by the State Board of Equalization and that I have determined the respective sums due as taxes, in the total amount of $_____, as required by law."

§ 2602. Collector's duty

The tax collector shall collect all property taxes.

§ 2603. Taxes charged to collector

At the time the auditor delivers the local assessment roll to the tax collector, he shall charge the collector with the taxes extended thereon, together with the taxes extended on the board roll.

§ 5148. Action against board and county based on evaluation, assessment ratio, or allocation of value of state-assessed property; procedure; grounds for maintenance of action

Notwithstanding Section 5140, an action to recover taxes levied on state- assessed property arising out of a dispute as to an assessment made pursuant to Section 721, including a dispute as to valuation, assessment ratio, or allocation of value for assessment purposes, shall be brought under this section. In any action brought under this section, the following requirements shall apply:

(a) The action shall be brought by the state assessee. There shall be a single complaint with all parties joined therein with respect to disputes for any year.

(b) The action shall name the board and the county or counties. When a county is named which collected taxes on behalf of a city or cities, the county shall give notice of that action to the city or cities within 30 days of receipt of advice from the board of the action. A fee shall be payable by the state assessee in an amount prescribed by the court to cover the reasonable costs incurred by a county or counties in giving that notice. Any city receiving notice of the action filed against the board and the county may, within 30 days of the receipt of that notice, intervene in that action. Whether or not a city intervenes in the action, any judgment rendered for an assessee shall be entered exclusively against the county; however, the county shall be entitled to recover separately from the city or cities and other tax entities those taxes collected by the county on behalf of the city or cities and other tax entities which are subject to refund to the assessee as the result of the judgment. Payment to the taxpayer upon the judgment and any interest thereon may be deferred by the county until the apportionment of property tax revenue next following the date of the judgment, or as the county and the taxpayer may otherwise agree. Interest shall accrue during any deferral period unless the county and taxpayer otherwise agree. The county may if it chooses to do so offset the amount of the judgment and interest recoverable by it from the city or cities and other tax entities against amounts held in the county treasury therefor or against amounts due and payable thereto, including, but not limited to, property tax apportionments. The amount of the fee required by this section shall not be recoverable by the assessee in the action and no judgment entered in the action in favor of the assessee shall provide for the recovery of the fee.

As used in this section, "county" includes a city and county.

(c) Service of the summons and complaint shall be only upon the board. The board shall serve as agent of the defendant county or counties for the purpose of service of process. A fee shall be payable by the state assessee in an

amount prescribed by the court to cover all reasonable costs incurred by the board while acting in its capacity as agent for the defendant counties.

(d) Venue of the action shall be in any county in which the Attorney General of California has an office or in which the state assessee has a significant presence.

(e) The action shall be limited in the case of valuation and allocation disputes to the grounds specified in the following:

(1) A petition for reassessment filed under Section 741, or any proceeding thereon.

(2) A petition for correction of allocated assessment filed under Section 747, or any proceeding thereon.

(f) A timely filed petition for reassessment or petition for correction of allocated assessment shall constitute a claim for refund if the petitioner states in the petition it is intended to so serve.

(g) The action shall be commenced only after payment of the taxes in issue and within four years after the latest of the dates that the State Board of Equalization mailed its decision or its written findings and conclusions on the following:

(1) A petition for reassessment filed under Section 741 and intended to constitute a claim for refund.

(2) A petition for correction of allocated assessment filed under Section 747 and intended to constitute a claim for refund.

(h) The action shall not be joined with any action filed under Section 5140.

(i) Any refund of tax overpayments and any interest thereon, determined in any action brought under this

section to be due shall be made by the defendant county or counties.

§ 5170. Assessment refund actions; judicial review

In suits for the refund of state-assessed property taxes, the trial court shall not be restricted to the administrative record, but shall consider all evidence relating to the valuation of the property admissible under the rules of evidence. The court shall base its decision upon the preponderance of the evidence before it.

(3)

FILED
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No. 98-584

In The

Supreme Court of the United States

October Term, 1998

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SOUTHERN PACIFIC TRANSPORTATION COMPANY'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Ninth Circuit correctly conclude that Congress abrogated the State of California's Eleventh Amendment immunity pursuant to Section Five of the Fourteenth Amendment when it enacted Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"), now codified at 49 U.S.C. § 11501 (hereinafter "Section 306")?

LIST OF PARTIES

Petitioner is the State Board of Equalization of the State of California.

Respondents are: Southern Pacific Transportation Company ("Southern Pacific"), a Delaware corporation with its principal place of business in Omaha, Nebraska; Northwestern Pacific Railroad Company and Visalia Electric Railroad Company which are related entities and wholly-owned subsidiaries of Southern Pacific. Following a merger with Union Pacific Railroad Company in 1997, Southern Pacific's name was changed to Union Pacific Railroad Company, a Delaware corporation with its principal place of business in Omaha, Nebraska. For ease of reference, these respondents shall be referred to collectively herein as "Southern Pacific."

Other Respondents are: The Napa Valley Wine Train, Inc., a California corporation with its principal place of business in Napa, California; The Stockton Terminal & Eastern Railway Company, a California corporation with its principal place of business in Stockton, California; The Santa Maria Valley Railroad Company, a California corporation with its principal place of business in Santa Maria, California; and the California Counties of Alameda, Amador, Butte, Calaveras, Colusa, Contra Costa, El Dorado, Fresno, Glenn, Humboldt, Imperial, Inyo, Kern, Kings, Lassen, Los Angeles, Madera, Marin, Mendocino, Merced, Modoc, Monterey, Napa, Nevada, Orange, Placer, Riverside, Sacramento, San Benito, San Bernardino, San Francisco, San Joaquin, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz,

LIST OF PARTIES – Continued

Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanilaus, Sutter, Tehama, Tulare, Ventura, Yolo and Yuba, all named as defendants below (hereinafter "defendant counties"). To date, none of the defendant counties has filed a brief in support of or in opposition to the Petition.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Southern Pacific respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") submitted by Petitioner State Board of Equalization of the State of California ("Petitioner").

STATUTES INVOLVED

See Constitution of the United States, Constitution of the State of California, statutes or regulations set forth or noted on pages 2 through 4 of the Petition and reprinted at Appendix D thereto.

STATEMENT OF THE CASE

This case concerns Petitioner's imposition of a tax which the district court has held, and which Petitioner does not dispute, is illegal and discriminatory in violation of Section 306. The district court had entered preliminary injunctions enjoining Petitioner and the defendant counties from attempting to collect any of the disputed tax for the 1993 through 1996 tax years, pending resolution of a related, consolidated case, *Atchison, Topeka & Santa Fe Railway Company v. State Board of Equalization of the State of California, et al.*, No. C 89-4030 DLJ, Master Consolidated No. C 81-4365 DLJ (N.D. Cal. filed Nov. 13, 1989) ("the *Santa Fe* case"). The *Santa Fe* case involved a tax identical to the one at issue here. There, the district court held a

trial and concluded that the discriminatory tax violated Section 306.

Based on the district court's decision in the *Santa Fe* case, Southern Pacific moved for summary judgment. Petitioner simultaneously filed a motion to dismiss, claiming it was immune from suit in federal court under the Eleventh Amendment.[1] In response to Southern Pacific's motion for summary judgment, Petitioner did not dispute that the tax violated Section 306. (*See* Petitioner's Response to Motions for Summary Judgment filed May 7, 1997). Instead, Petitioner simply reiterated its argument that it was immune from suit, incorporating by reference its motion to dismiss. *Id.* The district court agreed with Petitioner and dismissed Southern Pacific's claims on October 28, 1997.[2] Judgment was entered on February 3, 1998.

On February 27, 1998, Southern Pacific appealed to the Ninth Circuit. On March 23, 1998 the Ninth Circuit issued its opinion in *Oregon Short Line R.R. Co. v. Department of Revenue of Oregon*, 139 F.3d 1259 (9th Cir. 1998) ("*Oregon Short Line*"). In *Oregon Short Line*, the Ninth Circuit held that Congress validly abrogated Eleventh Amendment immunity pursuant to its powers under the

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[1] Petitioner had not raised that argument in the *Santa Fe* case prior to the trial.

[2] The district court simultaneously granted Santa Fe's motion for summary judgment. (*See* Appendix B to Petition). Petitioner appealed the district court's order in the *Santa Fe* case to the Ninth Circuit on June 15, 1998. *See* Ninth Circuit Docket No. 98-15128. On November 13, 1998, the Ninth Circuit granted Santa Fe's *unopposed* motion for summary affirmance of the district court's decision in that case.

Fourteenth Amendment when it enacted Section 306. *Id.* at 1267. On April 24, 1998, Southern Pacific filed a motion for summary disposition of its appeal based on the Ninth Circuit's decision in *Oregon Short Line*. On July 6, 1998, the Ninth Circuit granted Southern Pacific's motion, vacated the district court's decision, and remanded the case "for proceedings consistent with *Oregon Short Line*. . . . " (*See* Appendix A to Petition). Petitioner filed its Petition in this Court on October 5, 1998, appealing the Ninth Circuit's order.

Pursuant to the Ninth Circuit's mandate, on September 16, 1998, the district court entered judgment on mandate permanently enjoining Petitioner and the defendant counties from seeking to collect the discriminatory tax. (*See* Appendix B to Petition). On October 16, 1998, eleven days after filing its Petition here, Petitioner filed a notice of appeal to the Ninth Circuit, appealing from the judgment on mandate. (*See* Ninth Circuit Docket No. 98-15320, filed October 16, 1998). Thus, this matter – and indeed, according to Petitioner, the identical issue – is now pending before both this Court and the Ninth Circuit.[3]

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[3] Petitioner failed to seek: (1) a stay of the issuance of the Ninth Circuit's mandate pursuant to Rule 41(b), Federal Rules of Appellate Procedure; (2) a stay of the entry of judgment on the Ninth Circuit's mandate by the district court pursuant to Rule 62, Federal Rules of Civil Procedure; or (3) a stay from this Court pursuant to Rule 23, Supreme Court Rules.

FACTUAL BACKGROUND

The proceedings below make clear two things: one, railroads are the only taxpayers upon whom Petitioner imposes the tax at issue; and two, Petitioner does not dispute that this tax discriminates against railroads in violation of Section 306. Instead, it simply maintains that it is immune from suit in federal court.

Southern Pacific's claims relate to Petitioner's taxation of certain property rights for tax years 1993 through 1996, which Petitioner labeled "non-unitary railroad property eligible for 4-R Act relief" ("NURPEFAR"). NURPEFAR is, in essence, a railroad's **unexercised** right to sell or do something different with its property in the future. The district court entered preliminary injunctions prohibiting the collection of these taxes and later, after a trial concerning the legality of the tax in the *Santa Fe* case, ruled that the tax violated Section 306. In finding that the NURPEFAR tax was discriminatory, the district court stated: "The evidence proves that no other similarly situated taxpayers have been taxed in the manner similar to . . . railroads. Neither other state assessees nor locally assessed commercial and industrial property taxpayers are classified and taxed based on the unexercised 'right' to sell or do something different with their property in the future." (*See* Findings of Fact and Conclusions of Law ¶¶ 44-48, filed in the *Santa Fe* case on September 7, 1994).

REASONS FOR DENYING THE PETITION

This Court should deny review for several reasons. First, the Petition is premature. This case is currently

pending before the Ninth Circuit where Petitioner has raised the identical issue it raised here. Second, there is no conflict among the circuit courts of appeals that have addressed the question presented here. Those courts have rejected Petitioner's arguments. Third, granting Petitioner the relief it seeks will not end this litigation as Southern Pacific should then be allowed to pursue its claims pursuant to *Ex parte Young*, 209 U.S. 123 (1908), against Petitioner's individual members. Similarly, it should be permitted to maintain its claims against the defendant counties which are parties to this action. Finally, the Petition should be denied because the Ninth Circuit correctly held that Congress validly abrogated Eleventh Amendment immunity pursuant to its powers under the Fourteenth Amendment.[4]

I. REVIEW OF THE NON-FINAL ORDER OF THE NINTH CIRCUIT IS PREMATURE.

The primary reason that this Court should deny certiorari in this case is that the Petition is premature. Petitioner seeks review of a non-final order of the Ninth Circuit, which merely reversed the district court's dismissal of Southern Pacific's complaint and remanded the case to the district court for further proceedings. Because the case continues in the lower courts, review by this

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[4] Petitioner's request for relief meets none of the tests set forth in Supreme Court Rule 10, "Considerations Governing Review on Certiorari." Although the considerations in Rule 10 neither control nor fully measure the Court's discretion, they do "indicate the character of the reasons the Court considers" in granting review. *Lawrence v. Chater*, 516 U.S. 163 (1996).

Court of the constitutional question presented by the Petition may yet be rendered unnecessary.

Under these circumstances, it is the usual practice of this Court to deny certiorari. As this Court has frequently stated, certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision . . . . And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (citations omitted); *see also* Justice William J. Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 231-32 (1983) ("[W]e have made mistakes in granting certiorari at an interlocutory stage of a case when allowing the case to proceed to its final disposition below might produce a result that makes it unnecessary to address an important and difficult constitutional question."). Thus, the Court has stated that lack of finality "of itself alone furnishe[s] sufficient ground for denial of the application." *Hamilton-Brown Shoe Co.*, 240 U.S. at 258. Where, as here, a court of appeals has remanded a case for further proceedings, "it is not yet ripe for review by this Court." *Brotherhood of Locomotive Fireman & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967); *see also Urie v. Thompson*, 337 U.S. 163, 171-72 & n.10 (1949); *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

In this case, further proceedings continue in the lower courts. Indeed, on remand, the district court reconsidered Southern Pacific's motion for summary judgment on direction from the Ninth Circuit. On the basis of the

summary judgment record, the court found that Southern Pacific was entitled to relief from discriminatory state tax practices under Section 306, entering final injunctive relief for the railroad. Petitioner filed a separate notice of appeal of that final judgment to the Ninth Circuit – after it filed its Petition in this Court – raising the exact same issues presented by the Petition: "Whether section 306 of [the] 4-R Act is appropriate legislation to enforce the Equal Protection Clause of the 14th Amendment so as to abrogate the State's Eleventh Amendment immunity from suit in federal court." (*See* Petitioner's Docketing Statement filed in the Ninth Circuit on October 16, 1998). Thus, the Ninth Circuit is currently considering the identical issue presented by the Petition here. Under these circumstances, prudence counsels that the proceedings below be allowed to continue, in order to shed additional light on the record and permit a more informed judgment in this Court, should it become necessary. *See Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981) (where further proceedings may develop record and permit more informed judgment, compelling reasons exist for concluding that judgment is not final).

Because this Petition is not yet ripe for review in this Court, it should be denied. Petitioners are, of course, free to file a new petition should their pending Ninth Circuit appeal prove unsuccessful. *See Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979) (denial of petition at interlocutory stage of proceedings not treated as final disposition by this Court).

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS REGARDING THE QUESTION PRESENTED.

The only two federal appellate courts which have addressed the precise issue now before the Court have held that Section 306 is a valid exercise of Congress' power to abrogate Eleventh Amendment immunity. Consequently, there is no conflict in the circuits sufficient to warrant review by this Court. *See* Sup. Ct. R. 10(a).

In *Oregon Short Line,* the Ninth Circuit squarely addressed the issue presented here. The court recognized that while states have broad authority to impose different tax burdens on different taxpayers, this Court "has not hesitated to strike down taxation schemes which do not rest 'upon some reasonable consideration of difference or policy . . . .' " *Oregon Short Line,* 139 F.3d at 1266, citing *Allegheny Pittsburgh Coal Co. v. County Comm'n,* 488 U.S. 336, 344 (1989). The Ninth Circuit found that Section 306 was designed to correct just that type of unreasonable taxation. The court discussed this Court's previous pronouncements concerning Section 306, as well as its legislative history, and concluded:

> In the face of all that, it would take an unusual amount of pertinacity to cling to the notion that Congress could not enact [Section 306] pursuant to its power under the Fourteenth Amendment. Surely the statute may be regarded as an enactment to enforce the equal protection clause, is consistent with the Constitution, is adapted its ends, and does not provide remedies which are disproportionate to the desired goal of eliminating discrimination. (Citing *City of Boerne v. Flores,* 117 S. Ct. 2157 (1997)).

Oregon Short Line, 139 F.3d at 1267. The Ninth Circuit held that Section 306 "is a constitutionally sound enactment, which abrogated the State's Eleventh Amendment immunity, because Congress could draw its authority from Section Five of the Fourteenth Amendment." *Id.*

Similarly, only eight days after the Ninth Circuit rendered its decision in *Oregon Short Line*, the United States Court of Appeals for the Third Circuit independently reached the same conclusion in *Wheeling & Lake Erie Railway Company v. Public Utility Commission of the Commonwealth of Pennsylvania*, 141 F.3d 88 (3rd Cir. 1998).[5] Faced with the identical issue, the Third Circuit noted that the legislative history of Section 306 shows that Congress was aware of states' discriminatory taxation practices against railroads. *Id.* at 93. The court stated that "the very purpose of section [306] was to remedy discrimination against railroads," *id.*, and concluded:

> It is evident to us that Congress recognized the potential for state and local taxing authorities to discriminate against railroads in violation of their Equal Protection rights under the Fourteenth Amendment. We conclude that Congress had the power, pursuant to Section Five of the Fourteenth Amendment, to promulgate section [306], and did so to protect the railroads. Therefore, Congress validly abrogated Eleventh Amendment immunity, and the district court properly exercised jurisdiction over this lawsuit.

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[5] Curiously, although Petitioner was aware of *Wheeling* because Southern Pacific cited it to the Ninth Circuit as additional support for its motion for summary disposition, Petitioner fails to even mention *Wheeling* in its Petition.

Id. The Third Circuit also discussed this Court's recent decision in *City of Boerne*, concluding that Section 306 "is not out of proportion to its objective, nor does it change any constitutional protections." *Id.*

In summary, *Oregon Short Line* and *Wheeling* are consistent with each other and with this Court's prior decisions concerning Congress' authority to abrogate Eleventh Amendment immunity under Section Five of the Fourteenth Amendment. Accordingly, there is no reason for this Court to grant review.

III. ALTERNATIVE GROUNDS FOR THE RELIEF GRANTED EXIST IN THIS CASE.

A conclusion that Congress could not abrogate Eleventh Amendment immunity in enacting Section 306 would not end the inquiry regarding the permissibility of the requested injunctive relief in this case. The complaint here was filed not only against the state but also against the counties responsible for collecting the discriminatory tax.[6] Even assuming no congressional abrogation, only the state itself is protected by the Eleventh Amendment

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[6] As noted by Petitioner, Southern Pacific timely moved to amend its complaint to add as defendants the individual members of Petitioner who are responsible for administering the law in order to assert a claim under *Ex parte Young*. The district court denied the motion when it granted Petitioner's motion to dismiss, a ruling which Southern Pacific challenged in its appeal to the Ninth Circuit. (Appendix B to Petition). Thus, this issue remains to be resolved in this case.

from suits for injunctive relief. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

This Court has recently reiterated that the Eleventh Amendment does not foreclose an action for injunctive relief under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against a state official "to prevent . . . continuing violation[s] of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Ex parte Young*, 209 U.S. at 155-56). In *CSX Transportation, Inc. v. The Board of Public Works of the State of West Virginia*, 138 F.3d 537 (4th Cir. 1998), the Fourth Circuit held that under the doctrine of *Ex parte Young*, injunctive relief is available in federal court against the individual public officials involved to enjoin the collection of taxes which are discriminatory in violation of Section 306, even taxes that have already been assessed but not yet collected.[7] *CSX*, 138 F.3d at 543. This Court recently denied West Virginia's petition for a writ of certiorari in *CSX*. *West Virginia Board of Public Works v. CSX Transportation, Inc.*, 142 L. Ed. 2d 50 (1998).

Here, as in *CSX* , the railroad has not paid any of the disputed taxes. Thus, even if the Eleventh Amendment did provide Petitioner a defense, Southern Pacific would still be allowed to maintain its claim for injunctive relief against individual state officials acting in their official capacities.

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[7] Because of its ruling on the *Ex parte Young* issue, the Fourth Circuit did not reach the issue of whether Congress validly abrogated the state's Eleventh Amendment immunity under the Fourteenth Amendment in *CSX*. *Id.* at 540, n.4.

Granting Petitioner the relief it seeks would not dispose of this case for the additional reason that Southern Pacific's claims against the counties, which are parties to this action, are still pending. The Eleventh Amendment does not protect the counties from a suit for injunctive relief. *See, e.g., Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-01 (1979); *M.T. Healthy School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977); *Edelman v. Jordan*, 415 U.S. 651, 667, n.12 (1974); *Moor v. County of Alameda*, 411 U.S. 693, 718-20 (1973). Section 306 expressly contemplates that a railroad may bring an action against counties, as has been done by Southern Pacific here. Congress stated: "The following acts unreasonably burden and discriminate against interstate commerce, and a state, **subdivision of a state**, or authority acting for a state or a subdivision of a state may not do any of them. . . . [A] district court of the United States has jurisdiction . . . to prevent [such acts]." 49 U.S.C. § 11501(b), (c) (emphasis added). Here, complete relief could be afforded to Southern Pacific without Petitioner or its individual members as parties to this action. Ultimately, what matters to Southern Pacific is that the defendant counties in this action do not attempt to collect discriminatory taxes imposed in violation of Section 306. For this reason, injunctions have been entered enjoining the defendant counties **"from collecting or seeking to collect any taxes"** on the property at issue. (*See, e.g.*, Order for Preliminary Injunction as to 1996 Taxes of Southern Pacific Transportation Company entered December 4, 1996). The defendant counties, not Petitioner, collect the taxes at issue. Hence, even if Petitioner were ultimately dismissed from this action, Southern

Pacific could obtain complete relief from the defendant counties.[8]

IV. THE NINTH CIRCUIT'S CONCLUSION THAT CONGRESS VALIDLY ABROGATED ELEVENTH AMENDMENT IMMUNITY PURSUANT TO ITS POWERS UNDER THE FOURTEENTH AMENDMENT IS CORRECT.

In determining whether Congress has properly abrogated a state's sovereign immunity from suit through federal legislation, a court must ask two basic questions: (1) whether Congress has unequivocally expressed its intent to abrogate the states' immunity; and (2) whether Congress has acted pursuant to a valid exercise of power. *Seminole Tribe*, 517 U.S. at 54.

In this case, it is undisputed that Congress intended to abrogate the states' Eleventh Amendment immunity in enacting Section 306. Congress clearly expressed its intent to permit federal courts to exercise jurisdiction over suits against the states: "a district court of the United States has jurisdiction . . . to prevent a violation" of Section 306. 49 U.S.C. § 11501(c). Thus, the focus of this dispute is on the second question; *i.e.*, whether Section 306 was enacted pursuant to a valid exercise of congressional power.

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[8] The district court disagreed with Southern Pacific concerning this issue, as it held that Petitioner was an "indispensable party" under Rule 19, Federal Rules of Civil Procedure. Again, due to the summary disposition of Southern Pacific's appeal based on the *Oregon Short Line* decision, this issue was never reached by the Ninth Circuit and remains to be resolved.

The Ninth Circuit was clearly correct in concluding that Congress had the power to enact Section 306 pursuant to the express constitutional grant of legislative power found in the Fourteenth Amendment enforcement clause.[9] *Seminole Tribe* expressly reaffirmed this Court's long-standing rule that Congress has the authority to abrogate immunity pursuant to its remedial Fourteenth Amendment power to enforce by "appropriate legislation" the substantive protections of the Equal Protection Clause. *Seminole Tribe*, 517 U.S. at 58 (reaffirming *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)). Here, Congress clearly had the authority under the Fourteenth Amendment to enact legislation to prohibit pervasive and invidious discrimination against interstate railroads.

Section 306 was "Congress' solution to the problem of discriminatory state taxation of railroads. . . . " *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). It was enacted to address the concern that railroads " 'are easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 336 (1994) (quoting *Western Air Lines, Inc. v. Board of Equalization of S.D.*, 480 U.S. 123, 131 (1987) and S. Rep. No. 91-630, p. 3 (1969)).

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[9] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, Section Five.

Section 306 of the 4-R Act represents a congressional determination that state tax discrimination against railroads is "neither fair, equitable, nor justifiable." *Discriminatory State Taxation of Interstate Carriers*, S. Rep. No. 630, 91st Cong., 1st Sess. 2 (1969) (citation omitted). In order to combat that discrimination, Congress prohibited certain discriminatory state tax assessment and collection practices in Section 306. At the same time, Congress provided that "a district court of the United States has jurisdiction" to prohibit continuing discriminatory taxation by the states, as provided by the statute. *See* 49 U.S.C. § 11501(c). It deemed the federal remedy necessary in order to provide the railroads with a "plain, speedy and effective remedy" necessary "to eliminate discriminatory tax assessment and classification practices" by the states.[10] S. Rep. No. 630 at 8, 91st Cong., 1st. Sess. (1969).

Petitioner's suggestion that Congress could not have acted under its Fourteenth Amendment powers in enacting Section 306, because it did not expressly so state is without merit. The fact that Congress may not have

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[10] As this Court noted, more than a century ago:

> Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive or the Judicial Department of the State. The mode of enforcement is left to its discretion. It may enforce the right, that is, enforce its recognition **by removing the case from a State court in which it is denied, into a Federal court, where it will be acknowledged.**

Virginia v. Rives, 100 U.S. 313, 318 (1879) (emphasis added). This is exactly what Congress did in enacting Section 306.

recited its Fourteenth Amendment enforcement power in enacting Section 306 is not determinative. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."). In evaluating whether a congressional enactment is a valid exercise of congressional authority under its Fourteenth Amendment enforcement power, the proper inquiry is not whether Congress properly recited the authority under which it acted, but rather whether Congress ***could have*** so acted. *See EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) ("That does not mean . . . that Congress need anywhere recite the words 'Section Five' or 'Fourteenth Amendment' or 'equal protection' " in order to invoke its authority).[11]

Moreover, Petitioner fails to cite to the Court the legislative history and case law which are replete with evidence that Congress, in enacting Section 306, intended to put an end to the invidious discrimination states engaged in when taxing railroads.

Section Five of the Fourteenth Amendment dictates deference to the congressional determination found in Section 306 that a federal judicial remedy is necessary to eliminate discrimination against railroads. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989), this Court noted that Congress' Fourteenth Amendment power to prohibit discriminatory state conduct includes the power

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[11] *See also Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980) ("It was enough that the Court could perceive a basis upon which Congress could reasonably predicate a judgment" that the Fourteenth Amendment was violated).

to "define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."

In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court equated Congress' Section Five powers with broad powers expressed in the Necessary and Proper Clause:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Morgan, 384 U.S. at 650 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-46 (1880)); *see also Fullilove v. Klutznick*, 448 U.S. 448, 476-77 (1980) (opinion of Burger, C.J.).

Relying upon *Ex parte Virginia*, the *Morgan* Court set out a three-part test for determining when an enactment is appropriate legislation to enforce the Equal Protection Clause. Legislation is "appropriate" under the Fourteenth Amendment enforcement power if: (1) the statute may be regarded as an enactment to enforce the Equal Protection Clause; (2) it is plainly adapted to that end; and (3) it is not prohibited by but is consistent with the letter and spirit of the Constitution. *Morgan*, 384 U.S. at 651.

Courts accord "great weight to the decisions of Congress" in reviewing congressional enactments addressing equal protection concerns. *Fullilove*, 448 U.S. at 472 (citation omitted); *see Morgan*, 384 U.S. at 653 ("It was for Congress . . . to assess and weigh the various conflicting

considerations. . . . It is not for us to review the congressional resolution of these factors."). Accordingly, "Congress must have wide latitude in determining" proper measures "that remedy or prevent unconstitutional actions." *City of Boerne*, 117 S. Ct. at 2164.

Because it was enacted to prohibit a form of invidious state discrimination that Congress found particularly damaging to interstate railroads, Section 306 properly should be regarded as legislation to enforce the guarantee of equal protection of the laws. The threshold for such a determination is permissive, favoring a finding of congressional authority: "It is in the nature of our review of congressional legislation defended on the basis of Congress' powers under Section Five of the Fourteenth Amendment that we be able to discern ***some legislative purpose or factual predicate*** that supports the exercise of that power." *EEOC v. Wyoming*, 460 U.S. at 243 n.18 (emphasis added).

Obviously, Congress' power under Section Five is not unbounded. Congress may not, under the guise of its enforcement power, "decree the substance of the Fourteenth Amendment's restrictions on the States." *City of Boerne*, 117 S. Ct. at 2165. Thus, legislation "which alters the meaning" of the amendment's substantive provisions "cannot be said to be enforcing the clause." *Id.* For that reason, legislation that cannot conceivably be defended on the basis of preventing discrimination is invalid under Section Five. *See Wilson-Jones v. Caviness*, 99 F.3d 203 (6th Cir. 1996), *modified*, 107 F.3d 358 (6th Cir. 1997) (FLSA

minimum wage and overtime provisions cannot reasonably be viewed as enactments to enforce the Equal Protection Clause); *Mills v. Maine*, 118 F.3d 37, 49 (1st Cir. 1997) (same).

Where legislation seeks merely to "remedy or prevent" unconstitutional discrimination, however, it is a valid exercise of congressional authority under Section Five. *See City of Boerne*, 117 S. Ct. at 2157. Thus, congressional legislation aimed at preventing invidious state discrimination against a discrete group, such as the railroads, is clearly justified under Section Five. *See United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 553 (5th Cir. 1980) ("Congress's power under Section Five of the fourteenth amendment clearly extends to protection of any group of persons invidiously discriminated against by state law. . . . "), *cert. denied*, 451 U.S. 1002 (1981); *see also Morgan*, 384 U.S. at 656 ("[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that [the state law in question] . . . constituted an invidious discrimination in violation of the Equal Protection Clause.").

Moreover, as the Court recently noted in *City of Boerne*, 117 S. Ct. at 2163, Congress' authority to legislate under Section Five ***extends to the prohibition of state action which is otherwise permissible under the Equal Protection Clause***:

> Legislation which defers or remedies constitutional violations can fall within the sweep of Congress' enforcement power ***even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative***

spheres of autonomy previously reserved to the states."

City of Boerne, 117 S. Ct. at 2163 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)) (emphasis added). *See also Morgan*, 384 U.S. at 648 ("A construction of § 5 that would require a judicial determination that the enforcement of state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.").[12] Thus, the fact that certain of the

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[12] While *City of Boerne* discusses the relevant standards to be applied in determining whether legislation is "appropriate" under the Fourteenth Amendment enforcement clause, the particular holding of the case is inapposite to this dispute. In *City of Boerne*, the Court concluded that Congress lacked the power to alter the substance of the Fourteenth Amendment by statute. *See City of Boerne*, 117 S. Ct. at 2165. There, the Court considered Congress' power to enact the Religious Freedom Restoration Act of 1993 ("RFRA"). In enacting RFRA, Congress intended to overrule by statute, the Supreme Court's recent interpretation of the First Amendment Free Exercise Clause in *Employment Division v. Smith*, 494 U.S. 872 (1990), which had held that the government need not "justify burdens on religious exercise imposed by laws neutral toward religion," and instead required a compelling governmental interest to justify such legislation. *City of Boerne*, 117 S. Ct. at 2162 (quoting 42 U.S.C. § 2000bb(a)).

Because the statute attempted to rewrite substantially the contours of the First Amendment, the Court found that it could not be justified as "appropriate legislation" to enforce the free speech guarantees incorporated into the Fourteenth Amendment. *Id.* at 2168-72. The Court concluded that the enforcement power could not be asserted as a justification for such "general legislation upon the rights of a citizen." *Id.* at 2166

state activities barred by Section 306 might pass muster under the Equal Protection Clause does not prevent the Congress from prohibiting them under its Fourteenth Amendment enforcement power.[13]

While the line between substantive legislation prohibited by Section Five and remedial legislation permitted by it sometimes is "not easy to discern," *City of Boerne*, 117 S. Ct. at 2164, this Court has repeatedly reaffirmed the principle that remedial legislation may sweep broader than the substantive constraints of the Equal Protection Clause. *See, e.g., Morgan*, 384 U.S. at 643, 649 (provision of the Voting Rights Act of 1965 that prohibited states from denying individuals the right to vote based on their inability to speak English was "appropriate legislation" to enforce the Equal Protection Clause

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(quoting *Civil Rights Cases*, 109 U.S. 3, 13-14 (1883)). Consequently, the Court concluded that "Congress could [not] define its own powers by altering the Fourteenth Amendment's meaning. . . . " *Id.* at 2168. This is plainly not the case here.

[13] Petitioner suggests that prior to the passage of Section 306, disparate classifications concerning railroads for taxation purposes did not violate the Equal Protection Clause, citing *Nashville Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362 (1940). (Petition at 9-10). *Browning* has no application here. This case does not involve a state "classification" for property tax purposes. Instead, as the district court found, California's imposition of the NURPEFAR tax was discriminatory under Section 306(1)(d), because it was a tax imposed **solely** on railroads. As the Ninth Circuit noted in *Oregon Short Line*, notwithstanding *Browning*, this Court "has not hesitated to strike down taxation schemes which do not rest 'upon some reasonable consideration of difference or policy. . . . ' " *Oregon Short Line*, 139 F.3d at 1266 (citations omitted).

despite the Court's previous ruling that an English literacy requirement was "not in all circumstances prohibited" by the Fourteenth and Fifteenth Amendments). The governing test for determining when such legislation can be considered proper remedial legislation under Section Five is that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 117 S. Ct. at 2164. "The appropriateness of remedial measures must be considered in light of the evil presented." *Id.* at 2169.

Under this standard, Section 306 must be viewed as an appropriate remedial measure to enforce the Equal Protection Clause. As explained below, the injury to be prevented by the legislation – discriminatory taxation against railroads by the states – was substantial. Congress' desire to remedy this injury was properly grounded in two traditional equal protection concerns: (1) protecting railroads as a discrete class from being singled out for disparate treatment by the states, and (2) prohibiting discrimination against the instruments of interstate commerce generally. Finally, the remedial measures enacted in Section 306 were narrowly tailored to address only those equal protection concerns.

Before the enactment of Section 306, discriminatory state taxation practices were having a crippling effect on the railroad industry. *See* S. Rep. No. 630 at 3. Indeed, in a nine-year period ending in the late 1960s, "the railroads alone ha[d] been assessed more than $900 million in discriminatory taxes." *Id.* Moreover, as Congress made clear in the legislative history to Section 306, railroads generally had insufficient representation in state political

processes to protect themselves from this arbitrary and discriminatory state taxation:

> Unfortunately, interstate carriers, especially railroads, are easy prey for State and local tax assessors. Railroads, oil pipelines, and other interstate carriers are nonvoting, often nonresident, targets for local taxation, and cannot easily remove their right-of-way and terminals.
>
> While all interstate common and contract carriers are subject to discriminatory tax practices . . . there is no doubt that the railroad industry suffers most from the burdens which this bill would remove.

Id. Consequently, Congress sought to address what it perceived as a substantial and invidious form of discrimination against the railroad industry.

The statutory language and legislative history of Section 306 make clear that the basic purpose of the legislation was to prohibit this discriminatory treatment of the railroads by the states. The 4-R Act plainly recites that one of its many purposes is "to prohibit unlawful discrimination." 49 U.S.C. § 10101(12). Moreover, long before it was incorporated as a provision of the 4-R Act, Section 306 was endorsed by the Senate Commerce Committee in reports entitled, "Discriminatory State Taxation of Interstate Carriers." *See* S. Rep. No. 1483; S. Rep. No. 630. Those reports described the background of discriminatory practices against which Section 306 was enacted, noting that in the decade leading up to the enactment of the statute, states had assessed nearly $1 billion in discriminatory taxes against the railroads. S. Rep. No. 630 at 3. Thus, the record before Congress contained numerous

"examples of modern instances" (*City of Boerne*, 117 S. Ct. at 2169), of state tax discrimination against railroads. As previously noted, Congress was sympathetic to the dilemma the railroads faced as a result of lack of representation in each state's political process.

The Committee recognized that the Fourteenth Amendment Equal Protection Clause placed some limitations on the states' authority to single out railroads in taxation. S. Rep. No. 630 at 7. The Committee summarized testimony of the Chairman of the Interstate Commerce Commission regarding cases in which courts had found state tax practices to violate the Equal Protection Clause:

> [I]n the last few years . . . Federal district courts, **acting under the "equal protection" clause of the 14th Amendment of the Constitution**, have voided discriminatory tax assessments and levies on common carrier property to the extent such practices were in conflict with the applicable State laws or constitutional provisions.

Id. (emphasis added and citations omitted). Consequently, Congress was aware of the limitations that the Equal Protection Clause placed on states in taxing railroads and it enacted Section 306 against that background. Congress recognized that, under the Fourteenth Amendment, states cannot single out a group of taxpayers for unequal application of state tax laws that are facially neutral. *See also Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989).

Congress further recognized the importance of this rule in the railroad context, where this Court has not hesitated to strike down discriminatory state taxing

schemes involving railroads. *See, e.g., Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923) (intentional and arbitrary assessment of one owner for taxation at its true value, in accordance with the state constitution and laws, while other like property is systematically assessed much lower, is a violation of the equal protection of the laws); *Southern Ry. Co. v. Greene*, 216 U.S. 400 (1910) (discriminatory taxation of railroad violated the Equal Protection Clause); *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907) (discriminatory method of reassessment applied to street railroad company's property found to be a violation of the Equal Protection Clause of the Fourteenth Amendment). *See also Louisville & Nashville R.R. Co. v. Public Service Commission*, 249 F. Supp. 894 (N.D. Tenn. 1966), *aff'd* 389 F.2d 247 (6th Cir. 1968) (assessments of railroad properties at a higher percentage of actual cash value than the custom in assessing other property at a smaller fraction of actual cash value found as discriminatory assessment against railroads violative of the Equal Protection Clause of the Fourteenth Amendment). Hence, to the extent that Section 306 prohibits such practices, it is indisputably within congressional authority under Section Five of the Fourteenth Amendment.[14]

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[14] Moreover, this Court has repeatedly noted that the limitations on state taxation practices with respect to interstate companies are defined, in part, by the Equal Protection Clause. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 655-56 (1981) (noting that challenges to discriminatory state taxation are governed by three clauses of the Constitution: the Commerce Clause, the Privileges and Immunities Clause of Art. IV. § 2, and the Equal Protection Clause of the Fourteenth Amendment).

Section 306 thus represents a reasonable exercise of Congress' power to prevent and remedy invidious discrimination against railroads, a discrete class of taxpayers that had been singled out for disproportionate taxation.

The means adopted by Congress to remedy this discrimination were clearly proportional to the end sought to be achieved. Congress enacted Section 306 to ameliorate the effects of discriminatory taxation by the states. The means adopted to end this discrimination – Section 306's prohibition against discriminatory state taxation practices and its federal court remedy – are narrowly drawn "to reach the traditional Equal Protection goal of protecting a discrete class of individuals from arbitrary and capricious action by the state." *EEOC v. County of Calumet*, 686 F.2d 1249, 1252 (7th Cir. 1982). The statute's limited purpose is "[t]o provide a plain, speedy, and effective remedy to eliminate discriminatory tax assessment and classification practices. . . . " S. Rep. No. 630 at 8.

In enacting the remedial provisions of Section 306, Congress placed several major limitations on the railroad's ability to sue for relief. First, relief under the statute is limited to that necessary "to ***prevent*** a violation of" its anti-discrimination provisions. 49 U.S.C. § 11501(c) (emphasis added). Thus, railroads generally have recourse only to non-monetary, equitable and declaratory relief. *See* Pub. L. No. 94-210, § 306(2). And even when granting non-monetary relief, courts may only enjoin the assessment, levy or collection of the ***discriminatory portion*** of the state tax. Railroads may not obtain relief from that portion of the state tax which does not run afoul of Section 306's prohibitions. Thus, the statute does not

unduly interfere with the normal practices of a state taxing authority or with the states' ability to govern on a day-to-day basis.

Moreover, Congress did not sweep every single instance of discrimination by the states within the prohibition of the statute. Instead, Congress sought only to prevent certain discriminatory practices that had a ***substantial*** impact on the railroads. In addressing discrimination by the states in their property valuation practices, Congress provided that relief may be granted "only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction." 49 U.S.C. § 11501(c). This five-percent threshold leaves the states unfettered to engage in practices that might otherwise violate the Equal Protection Clause where the impact of the practice is negligible. *See Burlington Northern*, 481 U.S. at 464 ("Such a provision makes sense as a prohibition on the litigation of *de minimus* disparate-impact claims in the federal courts. . . . ").

Finally, in enacting Section 306, Congress gave the states three years in which to comply with its anti-discrimination provisions. Pub. L. No. 94-210, § 306(2)(b) ("provisions of this section shall not become effective until 3 years after the date of enactment of this section"). This delayed effective date provision allowed states sufficient time to review and amend their taxing statutes and practices in order to guarantee compliance. The lack of a similar provision in RFRA was one of several reasons this Court struck down the RFRA provisions at issue in *City of Boerne*, 117 S. Ct. at 2170 ("RFRA applies to all federal

and state law, statutory or otherwise, whether adopted before or after its enactment.").

Consequently, the limited remedy effected by Section 306 strikes the very balance required of legislation to enforce the substantive provisions of the Equal Protection Clause. While it addresses a substantial form of discrimination within the power of Congress to remedy, Section 306 is narrowly tailored to preventing that discrimination. Under the *City of Boerne* standard, then, Section 306 is clearly an appropriate measure to "enforce" the Fourteenth Amendment.[15]

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[15] The remaining *Morgan* tests are easily satisfied. First, it is clear that the means chosen by Congress to remedy the discrimination is plainly adapted to remedying the discrimination. The limited judicial remedy authorized under Section 306 is no broader than necessary to prevent ongoing discrimination. Second, if deemed permissible under the Fourteenth Amendment, Section 306 is not prohibited by any other substantive provision of the Constitution. *See Morgan*, 384 U.S. at 651.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF OHIO, ALABAMA, ARIZONA, COLORADO, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, MARYLAND, MICHIGAN, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WYOMING AND THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI

Amicus State of Ohio and 29 other amici States write to support the California State Board of Equalization and to urge the Court to grant the petition. The question presented goes to a core area of State sovereignty: the extent to which the Eleventh Amendment protects the integrity of the States' tax laws from second guessing in federal district courts.

Under Section 306 of the Railroad Revitalization and Regulatory Reform Act ("4-R Act") Pub. L. No. 94-210, 90 Stat. 33 (1976), Congress not only imposed a "prohibition on discriminatory state taxation of railroad property," *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987), but also gave railroads authority to seek declaratory and injunctive relief in federal court challenging disagreeable State taxes. *See* 49 U.S.C. § 11501(b) and (c). In view of this Court's decisions in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the question is whether the power Congress has assumed under the 4-R Act can be squared with the power the Constitution reserves to the States under the Eleventh Amendment. We respectfully submit that it cannot be.

The States have an immediate and significant stake in the matter. At a basic level, of course, "the integrity of [the States'] own processes is of particular moment" whenever State tax laws are in question. *Arkansas v. Farm Credit Services*, 117 S. Ct. 1776, 1780 (1997). Just as importantly, virtually every State assesses railroad property values and levies ad valorem taxes on rail transportation property, just as each State imposes taxes on other commercial, industrial and personal property. And in every State, taxpayers -- be they corporations or individuals -- enjoy State-created remedies for challenging such tax assessment and collection practices. These remedies usually reflect each State's unique tax laws, and virtually all (if not all) States have specialized tribunals with expertise over such questions. Under these circumstances, the 4-R Act's

jurisdictional grant to federal courts exacts a particularly high cost. It forces States to defend challenges to their tax policies for one particular class of property in a federal venue notwithstanding the creation of specialized state-tax venues already suited for the task and notwithstanding the availability of eventual review of state-court tax decisions (involving federal law) by this Court.

The case matters to the States for another reason. In subjecting California to suit in federal court, the Ninth Circuit diluted *Seminole Tribe* and *City of Boerne* to the point of meaninglessness. The former makes clear that Congress may not use its Commerce Clause powers to abrogate the States' Eleventh Amendment immunity from suit. And the latter makes clear that Congress may not use section five of the Fourteenth Amendment as an ersatz Commerce Clause. Under both decisions, Congress may remedy only unconstitutional State action, not State action with which the national legislature disagrees. Yet here there has been no showing that the States have been, or are about to, violate the constitutional rights of railroads. Nor did the Ninth Circuit make a contrary finding, as indeed it could not have. Railroad interests in this country have historically been more likely to receive favored than disfavored treatment. And, in the end, they have as little in common with the types of suspect classes that normally receive Fourteenth Amendment protection as any interest group in the country.

Finally, this case affects the States in more than just fiscal terms. Indeed, it demeans *City of Boerne* and *Seminole Tribe* to assume that they protect only State govenment fiscs. The first principles of a limited national government embodied in these landmark decisions do more than just that. They ultimately further the transcendent goal of federalism: that individual liberty is best secured by dividing the country into national and State governments, each with well-preserved and separate sovereign powers. In the hope of preserving the

vitality of these critical principles, the *amici* States submit this brief for the Court's consideration.

REASONS FOR GRANTING THE WRIT

I. THE ISSUE IS A RECURRING ONE AND THE NINTH CIRCUIT'S RESOLUTION OF IT CONFLICTS WITH THE REASONING OF OTHER FEDERAL COURTS.

In the aftermath of *Seminole Tribe* and *City of Boerne*, the lower federal courts have reached conflicting results in defining the scope of Congress's power under section five of the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity from suit in federal court. Be it in the context of claims under the Age Discrimination in Employment Act, compare *Coger v. Board of Regents*, 154 F.3d 296 (6th Cir. 1998), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Nov. 18, 1998) (No. 98-821), with *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822 (8th Cir. 1998); claims under the Family and Medical Leave Act, compare *Knussman v. State of Md.*, 935 F. Supp. 659 (D. Md. 1996), with *Thomson v. Ohio State Univ. Hosp.*, 5 F. Supp. 2d 574 (S.D. Ohio 1998); or claims under Congress's power to regulate copyrights and patents, compare *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 148 F.3d 1343 (Fed. Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3259 (U.S. Sept. 28, 1998) (No. 98-531), with *Chavez v. Arte Publico Press*, 157 F.3d 282 (5th Cir. 1998), *reh'g en banc granted* (Oct. 1, 1998), the lower courts have struggled to ascertain the proper sphere of national power under section five of the Fourteenth Amendment. A similar divergence of opinion has characterized recent 4-R Act decisions.

On one side of the ledger, the Ninth Circuit held in this case and in an earlier decision, *see Oregon Short Line R.R. v. Department of Revenue Oregon*, 139 F.3d 1259 (9th Cir. 1998), that Congress properly exercised its Fourteenth Amendment authority in passing the 4-R Act. In the Ninth Circuit's view, the 4-R Act satisfies the remedial prerequisites of *City of Boerne* because it is designed to correct discriminatory state tax practices and thus protects the equal-protection rights of the railroads. *See also Wheeling & Lake Erie Ry. v. Public Util. Comm'n*, 141 F.3d 88 (3rd Cir. 1998) (same); *Consolidated Rail Corp. v. State Bd. of Equalization and Assessment*, 1996 U.S. Dist. LEXIS 21989 (S.D.N.Y. 1996) (same); *Fox River Valley R.R. v. Department of Revenue*, 863 F. Supp. 893 (E.D. Wisc. 1994) (same).

On the other side of the ledger, several lower federal courts have reached precisely the opposite conclusion. In *Union Pac. R.R. v. State of Utah*, 996 F. Supp. 1358 (D. Utah 1997), the court held that the 4-R Act is designed to promote and protect interstate commerce, not to ensure the equal protection rights of railroads.

> [A]lthough Congress in passing the 4-R Act was clearly concerned about the discriminatory taxation of railroads, it cannot be said that there is a sufficiently strong connection between protection of railroads and recognized Fourteenth Amendment goals that would permit a conclusion that the 4-R Act . . . is legislation passed to enforce the Fourteenth Amendment.

Id. at 1362.

Following a similar course, another federal court found that the Act was passed to "strengthen the transportation infrastructure of the United States," an "admirable goal" that

was "well within the power of Congress acting pursuant to the Interstate Commerce Clause," but one that does not satisfy the remedial and proportionality requirements of *City of Boerne*. *Union Pac. R.R. v. Burton*, 949 F. Supp. 1546, 1554 (D. Wyo. 1996). The commercial objectives of the Act, said the court, "are far afield" from the objectives of the Fourteenth Amendment," *id.*, and therefore it does not constitute permissible legislation under Congress's section five powers.

In similar fashion, a district court in West Virginia refused to accept jurisdiction over a 4-R Act claim. Rejecting the argument that Congress had passed the 4-R Act to remedy past discrimination against railroads, the court found nothing in the "legislative purpose and predicate" of the law "evidencing a purpose to enforce rights under the Fourteenth Amendment." *CSX Transp., Inc. v. Board of Pub. Works*, 997 F. Supp. 749, 752 (S.D.W.Va. 1997), *rev'd. on other grounds*, 138 F.3d 537 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 63 (1998). Absent that remedial purpose, the court held, "the attempted abrogation of Eleventh Amendment immunity in the 4-R Act was ineffective because Congress did not legislate pursuant to a valid exercise of power." *Id.*

In another federal decision on point, a divided panel of the Third Circuit upheld the congressional abrogation. *See Wheeling & Lake Erie Ry. v. Public Util. Comm'n*, 141 F.3d 88 (3rd Cir. 1998). In dissent, however, Judge Garth reasoned:

> By enacting the 4-R Act, Congress was not legislating to prevent unconstitutional behavior. There is no evidence that the discriminatory taxation which Congress intended to prohibit under the 4-R Act ever rose to the level of a constitutional violation such that the railroads were deprived of their right to equal protection. *See, e.g., Nashville Chattanooga & St. Louis Ry.*

> *v. Browning*, 310 U.S. 362, 60 S. Ct. 968, 84 L. Ed. 1254 (1940) (holding that higher tax burden placed upon railroad property did not violate the Equal Protection Clause). Without such evidence, we have no basis to conclude that Congress had the power to enact the 4-R Act pursuant to its enforcement power under the Fourteenth Amendment.

Id. at 99.

Weighing the lessons of *City of Boerne*, while noting that disparate classifications of railroad property for tax purposes have always been viewed as constitutionally permissible, *see Nashville, Chattanooga & St. Louis Ry.*, 310 U.S. at 369 ("so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another"), Judge Garth concluded:

> Congress cannot make constitutional classifications unconstitutional, even though it can make such classifications unlawful. That is precisely what the 4-R Act did: it prohibited long-standing constitutionally permissible discriminatory taxation practices. It did not -- indeed, could not -- make such discrimination unconstitutional.

Id. at 100.

Even these differences of opinion among a host of Article III judges do not fully convey the need to resolve this issue. Since its passage in 1976, the 4-R Act has spawned hundreds of federal and state court challenges by railroads to State tax assessments and collections. While the merits of those cases turn on the particularities of each State's tax system and

the individualized assessments made by State or local tax authorities against particular property, there is one constant in every federal court 4-R Act case: the States' sovereign immunity. Resolution of the immunity issue in this or any other 4-R Act case depends not at all on State tax law or on the assessed value of particular property but rather on the unchanging words of the Eleventh and Fourteenth Amendments. Waiting for other federal circuits to weigh in on the question will not make the issue any more clear than it is today.

There is, in short, a split of authority on the question, with the Third and Ninth Circuits, together with two district courts, holding that the 4-R Act is a remedial response to discrimination against railroads, and three district courts (together with one circuit court judge in dissent) concluding that it is not. The widening split warrants prompt review.

II. THE NINTH CIRCUIT'S DECISION DISREGARDS *SEMINOLE TRIBE* AND *CITY OF BOERNE*.

The Ninth Circuit's holding -- that Congress may promote the economic interests of railroads under its Fourteenth Amendment enforcement powers -- is manifestly wrong. The Ninth Circuit held that Congress may abrogate the sovereign immunity of the States under the Eleventh Amendment through its Fourteenth Amendment enforcement powers. Taking the view that State tax laws may discriminate against railroads, the court found that Congress has the ability to enforce the railroads' equal protection rights by abrogating the States' Eleventh Amendment immunity. This interpretation, however, cannot be squared with *Seminole Tribe* and *City of Boerne*.

The 4-R Act provides that railroads may challenge State tax assessments and collection efforts in federal courts. 49 U.S.C. § 11501(c). The law thus "contains a clear legislative

statement of the intent of Congress to abrogate the States' immunity from suit in federal court." *Burton*, 949 F. Supp. at 1552. Therefore, as in *Seminole Tribe*, the inquiry is "narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?" *Seminole Tribe*, 517 U.S. at 59. In other words, does the Fourteenth Amendment grant Congress the power to abrogate the State's sovereign immunity in railroad tax cases?

In the Ninth Circuit's view, two factors support congressional power. First, there is "little doubt" that "discriminatory state taxation can implicate equal protection concerns." *Oregon Short Line*, 139 F.3d at 1266. Second, even though some classifications prohibited by the 4-R Act "might have been sustainable against an equal protection challenge in the Supreme Court, . . . Congress could eliminate all railroad specific discrimination, even if it eliminated more practices than the Supreme Court itself would have done" and "[t]herefore, § 11501 is a constitutionally sound enactment, which abrogated the State's Eleventh Amendment immunity, because Congress could draw on its authority from § 5 of the Fourteenth Amendment." *Id.* at 1267. The lower court is wrong on both counts.

First, while it may theoretically be possible for States to violate the equal protection rights of rail carriers, they may only do so by treating rail carriers differently from other similarly-situated businesses, and even then only when the differential treatment is irrational in nature. "Conceptually . . . any notion of discrimination assumes a comparison of substantially similar entities." *General Motors Corp. v. Tracy*, 117 S. Ct. 811, 824 (1997) (rejecting equal protection challenge to Ohio's tax distinction between sales by regulated utilities and sales by unregulated natural gas distributors). *See also Vacco v. Quill*, 117 S. Ct. 2293, 2297 (1997) (the equal protection clause

"embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly") (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.")).

Accordingly, when confronted with evidence of past discrimination, Congress may promote similar treatment for similarly situated persons, as for example Congress has done through the voting rights laws. But the 4-R Act does no such thing. It instead mandates that rail transportation property be treated like other commercial and industrial property -- regardless of whether that other property is in any way similar to rail property. No matter how materially the uses of rail property may differ from the uses of, say, robot welders in an industrial plant, or shelving in a retail store, and no matter how important the distinction weighs in effectuating the otherwise legitimate purposes of State taxing policy, Congress has barred the States from drawing any such distinction.

On this record and under these circumstances, the 4-R Act in no way "enforces" the equal protection rights of railroads; it expands them. For it mandates precisely what equal protection does not: equal treatment of *differently* situated persons and things. What Congress has instead done is promote interstate rail commerce by affirmatively tying rail-tax rates to the sometimes lower tax rates for other businesses. In doing so, Congress has substituted its judgment favoring interstate rail commerce for the potentially different judgments of the 50 State legislatures. While this may constitute a legitimate exercise of power under the Commerce Clause, *see Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992) (acknowledging that the Commerce Clause gives Congress "free[dom] to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes"),

it does not stick to the contours of Congress's carefully-proscribed section five powers.

Nor can the railroads justify this type of preferential treatment on the ground that the States have engaged in a pattern and practice of violating their equal protection rights in the past. Time and time again, the Court has permitted the States to treat railroad property differently from the property of other businesses. *See, e.g., New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 579 (1938) ("Carriers may be treated as a separate class . . . and, as such, taxed differently or additionally."); *Atlantic Coast Line R.R. v. Daughton*, 262 U.S. 413, 424 (1923) ("The State might, consistently with the equal protection clause, have subjected only public service corporations to the income tax, or it might have laid upon them a higher income tax than upon others, as it laid upon railroads a higher franchise tax than it did upon other corporations."); *Southern Ry. Co. v. Watts*, 260 U.S. 519, 530 (1923) ("Railroads differ in so many respects from other properties that they may, as a class, be taxed differently or additionally, if that is not inconsistent with the constitution of the State."); *Kentucky R.R. Tax Cases*, 115 U.S. 321, 337 (1885) ("There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the legislature has seen fit to impose.").

Second, the Ninth Circuit's approach knows no bounds. It ultimately establishes an horizonless grant of congressional power to abrogate the States' immunity. If correct, it permits every burden on interstate commerce to be recast as "discrimination" against those persons or entities whose costs rise due to State regulation, thereby inviting a preemptive Fourteenth Amendment remedy whenever the congressional will

arises. *See General Motors*, 117 S. Ct. at 824 n.12 (distinguishing "discrimination" analysis from "burdens" analysis under the Commerce Clause). The Ninth Circuit slips easily around *Seminole Tribe* and apparently reverts back to the now-discarded teachings of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), by finding equal protection concerns hidden beneath a law heretofore thought to be grounded in the Commerce Clause. *See Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987) (noting that the 4-R Act was enacted "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States") (quoting 45 U.S.C. § 801(a)). In the final analysis, the Ninth Circuit's reading of *City of Boerne* gives Congress authority to create a federal forum for virtually any legal remedy available against the States, leaving little teeth in *Seminole Tribe* or in the Eleventh Amendment itself.

An additional problem lurks here as well. Even if *City of Boerne* and *Seminole Tribe* somehow permitted the abrogation of the States' immunity from suit because of past disparate tax treatment accorded by the States to railroads, another component of *City of Boerne* affirmatively bars that abrogation now. In *City of Boerne*, the Court made clear that Congress's power under section five of the Fourteenth Amendment is remedial, not substantive. 117 S. Ct. at 2164. Part and parcel of that conclusion is that there must be "a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented." *Id.* at 2169. Just such a congruence existed under the Voting Rights Act but not under the Religious Freedom Restoration Act (RFRA). *Id.* at 2169-70. Prior to the Voting Rights Act, there had been numerous examples of generally-applicable laws passed because of racial animus, making Congress's response proportionate to a great and widespread evil in the States. Prior to RFRA, in pointed

contrast, there were no modern examples of laws passed because of religious bigotry. RFRA therefore was properly found to be a disproportionate response to the alleged problem of general laws having an incidental effect on religious practices.

The 4-R Act, as applied to the States, falls on the RFRA, not the Voting Rights Act, side of the section five line. It does so both in the sense that it contravenes the numerous cases in which this Court has found no barrier in the Constitution to the type of distinctions condemned by the Act, and in the sense that requiring rail carriers to be treated just like differently-situated businesses sweeps so broadly beyond equal protection values that the Act would fail the *City of Boerne* requirements of "congruence and proportionality." *See also Quill,* 504 U.S. at 318 (acknowledging that "Congress has the ultimate power to resolve" the question of tax nexus under the Commerce Clause, but presumably no such power to alter due process standards). The 4-R Act represents an unwarranted response to an unproven, and indeed virtually nonexistent, harm, and intrudes unnecessarily in an area -- State taxation -- where the States are supposed to enjoy "considerable latitude." *Commonwealth Edison v. Montana,* 453 U.S. 609, 622 (1981).

Congress itself has noted that its railroad laws, including the 4-R Act, are designed "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense." 49 U.S.C. § 10101(4). Congress of course has every right to make those judgments, but it must do so under its Article I powers, not the Fourteenth Amendment. Some may view the States' disparate tax treatment of railroad property as unfair or improper, but unless it violates the Constitution -- and this Court has said repeatedly that it does not -- Congress cannot abrogate the States' immunity from suit in federal court by enacting legislation designed to stop that disparate treatment.

And this is particularly true in matters of State taxation, a matter as close to the core of State sovereignty as any there is. "We have long recognized," the Court has emphasized, "that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995). *See also Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 108 (1981) ("'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.'") (quoting *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932)); *Dows v. City of Chicago*, 78 U.S. 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.").

In spite of the Court's historic reticence to allow the national government to regulate State taxes, those opposed to unfair State taxation of railroads still have considerable power, for the 4-R Act -- aside from its grant of jurisdiction to the federal courts to hear legal challenges to State railroad tax assessments -- remains good law. State tribunals are open in every State to hear 4-R Act claims, as well as any other legal challenge to the assessment or collection of State railroad taxes. Accordingly, even accepting the contention that the States have discriminated against railroads and their property, Congress's

"remedy" is out of all proportion to the alleged harm. The Court should accept the petition to reaffirm this foundational principle.

One might fairly ask why this case, and these issues, should not be resolved under *Ex Parte Young*, 209 U.S. 123 (1908). There are two reasons. One, the railroads filed this case against an agency of the State of California, not against one of the State's public officials. The "narrow" exception to the Eleventh Amendment established by *Ex Parte Young* "has no application in suits against the States and their agencies." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993). Two, even if this claim had been filed against a State official, *Ex Parte Young* still would not apply because the claim seeks retroactive relief. As the district court correctly found and as no party has contested, since plaintiffs are seeking to enjoin tax assessments that have already become final, they "are in fact seeking retroactive, rather than prospective injunctive relief with respect to the Board." *See* Pet. App. 20-21. The *Ex Parte Young* exception thus does not apply in this setting. *See Green v. Mansour*, 474 U.S. 64 (1985).

CONCLUSION

For the foregoing reasons, the Court should grant the writ.

Respectfully submitted,

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